83-9

No. .....

In The

Supreme Court of the United States

October Term, 1982

STATE OF NEW MEXICO, ex rel.
"One Minute of Silence" Statute, et al.,

Petitioners,

vs.

JUAN G. BURCIAGA, U.S. District Court Judge
for the District of New Mexico,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the New Mexico State Statute "One Moment of Silence" an unconstitutional violation of the First Amendment to the U. S. Constitution?

2. Did the U. S. District Judge's injunction exceed his jurisdiction under *Valley Forge Christian College v. American United for the Separation of Church and State*, 102 S. Ct. 752 — U. S. —.

3. Was the injunction unconstitutional as a violation of Article III of the U. S. Constitution?

4. Was prohibition to the 10th Circuit Court of Appeals an appropriate remedy to set aside the injunction?

5. Can the State of New Mexico have its legislative acts nullified by the U. S. District Court and bypass all State Judicial channels and enjoin the application of the legislative act within the State of New Mexico during a lengthy appellate procedure in the 10th Circuit?

6. Can all authorities and persons within the State of New Mexico be enjoined and brought under the contempt power of a U. S. District Judge during a lengthy appellate process?

7. Has the "Younger Doctrine" been violated by the assumptions of jurisdiction over a state statute and a permanent injunction?

8. Does a U. S. District Judge have jurisdiction to declare the State law unconstitutional based on the State Constitution?

9. Can a U. S. District Court declare a State Statute unconstitutional when the plaintiff has received "no injury in fact?"

10. Does the declaration of unconstitutionality violate the First Amendment rights of the children of New Mexico to the free exercise of religion?

11. Is the declaration of unconstitutionality and permanently enjoining "any program *similar* to the "Moment of Silence" unconstitutional?

12. Are the rights of the people of New Mexico to freedom violated by the injunction considering its sweeping terms?

13. Does the Injunction violate the sovereignty of the State of New Mexico and is it a violation of the Tenth Amendment to the U. S. Constitution?

14. Does the Treaty of Guadalupe Hidalgo bar the judgment and injunction by the U. S. District Court?

15. Is the judgment a violation of New Mexico Constitution, Art. 11, Sec. 5?

16. Does the judgment violate New Mexico's Enabling Act of 1910 that "perfect toleration of religious sentiment shall be secured."

17. Was the denial of the Writ by the Tenth Circuit a refusal to exercise its supervisory power over the lower court in that Art. III of the U. S. Constitution prohibits the use of the U. S. District Court when the plaintiff has sustained no injury?

18. Is the judgment and injunction in violation of Art II, Sec. 11 to the New Mexico Constitution?

19. Is the broad and ambiguous use of the phrase anything "similar" to the "Moment of Silence" in violation of the Fourteenth Amendment to the U. S. Constitution considering the "contempt" power of the U. S. District Judge?

LIST OF PARTIES INVOLVED

STATE OF NEW MEXICO; the individual Petitioners to the Petition for Writ of Prohibition, each of whom signed the petition—and all of whom are represented by attorneys Eugene Klecan and Gene Franchini, Esq.

THE HONORABLE JUAN G. BURCIAGA, U.S. District Judge. JERRY DUFFY on his own behalf and next friend of JOHN R. DUFFY, his minor son, parties plaintiffs in the U.S. District Court, and who were represented by attorneys Dan A. Gonzales and Angel F. Saenz, co-operating attorneys for the American Civil Liberties Union of New Mexico; also Raymond W. Showers, Legal Director ACLU of New Mexico.

LAS CRUCES PUBLIC SCHOOLS, the superintendent and members of the Board of Education of Las Cruces Public School, parties defendant in the U.S. District Court for the District of New Mexico, all of whom were represented by Attorney Emery Cuddy.

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OPINIONS BELOW

1. See Appendix for 28 page opinion and findings by U.S. District Judge. App. 1.

2. Also Permanent Injunction Declaratory Judgment and Trial Judgment of U.S. District Judge. App. 25.

3. Denial by Tenth Circuit. App. 27.

4. See Appendix for Complaint and Plaintiffs Requested Findings of Fact and Conclusions of Law. App. 30.

5. Petition for Prohibition is in Appendix, which had as Exhibits 1, 2 and 4 above.

JURISDICTION

The dismissal of the Petition for Prohibition by the U. S. Court of Appeals for the Tenth Circuit was filed April 8, 1983. There was no opinion. Jurisdiction rests in the court under the "All Writs Act", 28 U. S. C. § 1651, also under Rule 21, Rules of Appellate Procedure, also under 28 U. S. C. § 1254. *Schlagenhauf v. Holder,* 379 U. S. 104, 13 L. ed. 2d 152, 85 S. Ct. 234 says "It is not disputed that we have jurisdiction to review the judgment of the Court of Appeals, 28 U. S. C. § 1254 (1)."

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

1. U. S. Constitution, Art. III, Sec. 2, Clause 1. Subject of jurisdiction "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States and Treaties made or which shall be made, under their authority."

2. U. S. Constitution, Amendment 1. "Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof; or abridging the freedom of speech, of the press...."

3. U. S. Constitution, Amendment 10. "Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people".

4. U. S. Consitution, Amendment 5. "Nor shall any person be deprived of life, liberty or property, without due process of law...."

5. Constitution of State of New Mexico, Art. II, Section 3. "The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state".

6. Constitution of State of New Mexico, Article II, Section 5 (Rights under Treaty of Guadalupe Hidalgo preserved).

> "The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate."

7. New Mexico Constitution, Article XII, Section 1 (Free Public Schools).

> "A uniform system of free public schools sufficient for the education of, and open to all the children of school age in the state shall be established and maintained."

8. New Mexico Constitution, Article II, Section 11 (Freedom of Religion).

> "Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political rights

> or privilege on account of his religious opinion or mode of religious worship. . . ."

9. Enabling Act for State of New Mexico (Act of June 20, 1910, 36 Statutes at Large 557 Chapter 310)". Section 2 A.

> "That perfect toleration of religious sentiment shall be secured and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship".

10. Treaty of Peace Between United States and Mexico (1848). See Statutes at Large, Vol. 9 pp. 922-943. The treaty begins:

> "In the name of Almighty God".

The preface ends:

> "Under the protection of Almighty God, the Author of Peace."

Article IX of said treaty reads in part:

> "Mexicans who . . . shall not preserve the character of Mexican citizens . . . and in the meantime shall be . . . secured in the free exercise of their religion without restriction."

See *Chadwick v. Campbell,* 115 F. 2d 401 (10th CCA, 1940).

11. New Mexico Statutes Annotated, 1978, Section 25-5-4.1 says local school boards; additional powers.

> "Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken".

12. 28 U. S. C. § 1651 Writs (a).

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary and appropriate in and of their respective jurisdiction and agreeable to the usages and principles of law."

STATEMENT OF FACTS

The New Mexico Legislature overwhelmingly passed an act known as "Minute of Silence" in 1981, Section 22-5-4.1 N.M.S.A., 1978. It was implemented by the Las Cruces School Board. Attorneys who identified themselves as "cooperating attorneys for the American Civil Liberties Union of New Mexico" brought an action in the U. S. District Court in the name of a father and son named "Duffy" and pursuant to 42 U. S. C. § 1983 claiming that the act violated the federal constitution's First and Fourteenth Amendments and also claimed that it violated the New Mexico Constitution and a State Statute. They asked for relief. The U. S. District Judge Juan Burciaga conducted a hearing and declared it unconstitutional under both the federal and state constitutions. He wrote a lengthy memo opinion which also constituted his findings. There was no Request for a finding that the plaintiff, who was in a Las Cruces school, had suffered any actual injury and there was no finding by the court of actual injury. A permanent injunction was issued which prohibited any use of the act and also prohibited anything "similar" to the statute. An appeal was taken on March 14, 1983 by one Jean Walsh who was not a party below but who was mentioned by the opinion as being a person who had been religiously

motivated and who had been active at the legislative level and also in the implementation with the Las Cruces School Board. She also appealed in "behalf of children within Las Cruces School District". Ten days after the appeal was filed the Clerk for the U.S. District Court wrote a letter to the Clerk for the Tenth Circuit stating that "in my opinion the appellant does not have standing to appeal in this matter" and asked the 10th Circuit Clerk "I would appreciate your review and determination whether the appellant does have standing to proceed with the appeal". All necessary papers for the appeal have been processed. On March 30, 1983 the 10th Circuit Clerk informed the attorneys that the "Court is considering summary dismissal of this case for the reason that the Court may lack jurisdiction". The clerk asked for briefs on the question, "Does Jean Walsh have standing to appeal the judgment?" An extension was granted on the briefs until April 4, 1983, at which time briefs were filed. No word has been received from the Tenth Circuit. Meanwhile New Mexico is under a broad, vague injunction throughout the state. The Legislative Act, "A minute of Silence" has been destroyed.

The undersigned's experience and observation of 10th Circuit appeals indicate at least one year. There will be a victory for the ACLU regardless of the outcome. As is set out in the Petition, the Las Cruces School Board made a decision not to appeal only a short time before the appeal period would end. It did so because the State would not authorize the funds to appeal and the attorneys who defended with State funds at the trial level were not given funds to appeal by the Risk Management Division of the State.

The Petitioner in the 10th Circuit identified itself as a New Mexico Legislative Act, "One Minute of Silence" asserting jurisdiction from the "State of New Mexico, ex rel". Also standing was claimed from the state of New Mexico through the cooperation furnished by and from the Risk Management Division. The Attorney General who came into office on January 1, 1983 did not join. Numerous persons throughout the state signed as Petitioners for Prohibition claiming the right to do so under the Tenth Amendment.

The citizens of New Mexico have gotten nowhere and are losing their rights by sheer inaction. There is no adequate remedy at law or in the appellate procedures.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Writ requested of this court is because of a denial of a Writ of Prohibition by the Tenth Circuit as against U. S. District Judge Juan G. Burciaga. *Ex parte Foley,* 332 U. S. 258, 259, 260, 91 L. Ed. 2041 67 S. Ct. 558 says "mandamus, prohibition and injunction against judges are drastic and extraordinary measures." "We do not doubt our power in a proper case to issue such writs". "These remedies should be resorted to only where appeal is a clearly inadequate remedy". We have here a "really extraordinary" cause.

We incorporate herein the petition for prohibition filed in the Tenth Circuit as a basis for our request for a Writ of Certiorari. It is in appendix App. 42.

Prohibition properly lies to prevent judicial action outside of its jurisdiction. *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 26, 87 L. Ed. 2d 1185, 63 S. Ct. 938. We are here dealing with an injunction against all persons in the State of New Mexico, and against all departments of the government of the State of New Mexico from top to bottom. Only the School Board of Las Cruces and its members were parties to the action in the U. S. District Court. The contempt power of the court is a reality. Its punitive power could go against anyone regardless of their ignorance or knowledge of the injunction. The injunction resembles a criminal statute. No jurisdiction exists for such an all inclusive permanent injunction, nor for the asserted basis for its issuance. It is significant that the opinion, P. 27 App. 23 in referring to the injunction against anything "similar" to the "Minute of Silence" says "this will guarantee that the defendant will not again be pressured into adopting such a program, and insures the integrity of the holding of the Court." It is clear that the findings have already found that non-public officials were responsible for an unconstitutional legislative act and its implementation by the local school board. Judge Burciaga labels as "Pressure" overcoming the "free will" of public officials. No one thought it was federally unconstitutional when it was passed and implemented by an overwhelming state governmental activity including the Governor's signature. It is an "extraordinary" situation to have all the people of the State of New Mexico under the injunction of one U. S. District Judge.

The injunction, because of its broad and undefined scope, is an intimidation and an interference with the sovereignty of the State of New Mexico and all of its gov-

ernmental function for which no jurisdiction exists. It is at the same time an interference and an intimidation against every individual citizen in the State of New Mexico against whom sanctions could be applied immediately. No such jurisdiction exists in the U. S. District Court over the citizens of New Mexico. Congress could not pass an act which would be constitutional if it contained the vague prohibitions of this injunction. The Tenth Amendment of the U. S. Constitution denies any such power to any branch of the federal government.

The proponents of legislative acts which turn out to be constitutional as decided by a U. S. District Judge receive a type of ex post facto label as conspirators against the Constitution. Treason is defined in the U. S. Court and is restricted to that definition.

No jurisdiction exists to hamper individual efforts in state government channels to promote something "similar" to "One Minute of Silence".

Constitutional hearings are not criminal trials. A State statute is not an attack upon the supremacy of the federal government and to surround a state legislature and the people with a federal injunction like this one is destructive of state sovereignty and makes the U. S. District Court the forum whereby all legislative acts can be passed upon with finality.

The Petition for Prohibition points out the irreparable harm involved in continuing this injunction through an appellate procedure. With the passage of the usual appellate time period, the power of the federal government thus applied every minute, tends to diminish efforts to exercise the true constitutional rights of the people and

the state an dto establish a precedent for the unlawful extension of federal power. Those opponents of state rights have a vehicle to hamper state governments which do not agree with every ACLU objective. Plaintiffs can come into a U. S. District Court on a moment's notice and require defenders of state legislative acts to follow a prolonged course in order to get any relief meanwhile destroying the legislation. *Valley Forge Christian College v. Citizens United, et al., supra,* says that federal courts are not college debating forums. This is language saying that jurisdiction is lacking. Prohibition lies. Irreparable harm goes on every minute that injunction is in effect. See Petition for Prohibition, pp. 17-20 and its exhibits for the analysis of complete lack of "Injury in Fact." App. 56.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 81-876-JB

JERRY DUFFY, on his own behalf and as next friend of John P. Duffy, his minor son,

Plaintiff,

vs.

LAS CRUCES PUBLIC SCHOOLS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed at Albuquerque February 10, 1983)

THIS MATTER comes before the Court for resolution of the merits of the plaintiff's complaint. At issue is the constitutionality of § 22-5-4.1, NMSA 1978, a statute authorizing local school boards in New Mexico to implement a daily moment of silence in public schools within the local school districts. Having considered the evidence adduced at trial, the arguments of counsel and the relevant authorities, the Court concludes that § 22-5-4.1 represents an unconstitutional infringement on the Establishment Clause of the First Amendment. This memorandum opinion shall constitute the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff Jerry Duffy is a taxpayer and a citizen of New Mexico. He brought this action on his own behalf, and on behalf of his son, John P. Duffy, a minor.

John Duffy is also a citizen of New Mexico, and currently attends public school in the Las Cruces Public School District [hereinafter, the District].

The District, a defendant herein, is responsible for administering that part of the New Mexico public school system which operates in and near Las Cruces. The District's governing body is the Board of Education of the Las Cruces Public Schools [hereinafter, the Board]. The Board adopts and oversees enforcement of the policies governing the operations of the District.

Defendants Joan M. Pucelik, Walter L. Rubens, Vincent Boudreau, Mrs. Tom Salopek, and Everett Crawford are the current members of the Board. Each was duly elected by the qualified voters residing in the District. At all pertinent times prior to June 30, 1982, Defendant John E. Stablein was the Superintendent of Schools for the District. Stablein was selected by the Board to serve as Superintendent. Since July 1, 1982, Harold W. Floyd has served as Superintendent. The Superintendent of Schools is responsible for administering policies enacted by the Board in the schools of the District.

The challenged statute, § 22-5-4.1, NMSA 1978, provides that:

> Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken.

The law was introduced during the 1981 Session of the New Mexico Legislature as House Bill 205. The legislation was sponsored by Representatives Randall Sabine and William O'Donnell, both of whom reside in Dona

Ana County, in or near Las Cruces. H. B. 205 was passed by the Legislature during the 1981 session, and signed into law by Governor Bruce King.

In late 1980 or early 1981, Representative O'Donnell asked Mr. William McEuen, General Counsel to the State Department of Education, to draft a bill which would permit students to pray in school. O'Donnell acted at the urging of a Mrs. Jean Walsh. O'Donnell instructed McEuen to confer with Walsh for advice on the matter. O'Donnell also instructed McEuen to provide recommended language for a bill which would authorize some form of prayer in New Mexico public schools.

Mrs. Walsh directed McEuen's attention to the case of *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976). In that case, the court upheld the constitutionality of a statute very similar to that being challenged in this case. In drafting H. B. 205, McEuen relied heavily on the statute which was at issue in *Gaines v. Anderson*. H. B. 205 adopts verbatim the material language of the Massachusetts statute. The word "contemplation" was not in the Massachusetts law, but was inserted into H. B. 205, purportedly to demonstate the neutrality of the statute.

Although there is no formal written legislative history of H. B. 205, it is clear that the pre-eminent purpose of § 22-5-4.1, NMSA 1978, was to establish a devotional exercise in the classrooms of New Mexico public schools. The motive of Representative O'Donnell was to establish prayer in the public schools, as can be seen in his instructions to McEuen. And McEuen perceived the intent of O'Donnell to be to establish prayer in the public schools. In the memorandum to O'Donnell which contained the proposed bill which became H. B. 205, McEuen said that his purpose was to recommend wording for "a

bill which would authorize some form of prayer in our public schools."

The plain language of the statute also supports the conclusion that the legislative purpose was to establish prayed in the public schools. Obviously, inclusion of the word "prayer" is a clear indication of the legislative purpose. Indeed, it could hardly be more clear. The defendants urge that the inclusion of the words "contemplation" and "meditation" indicates the "neutral" intent of the legislature. The Court is not persuaded by this argument. It is clear that McEuen inserted these words solely for the purpose of attempting to disguise the religious nature of the bill.

H. B. 205 authorized local school boards to implement the moment of silence. The defendants affiliated with the District and the Board chose to implement the exercise in the public schools of Las Cruces. Therefore, consideration of the purpose behind the implementation is clearly appropriate to this inquiry.

It is clear that the purpose of the Board was to provide a program of prayer in District schools. In the summer of 1981, the Board began discussing the possible implementation of the moment of silence. These discussions were also undertaken at the urging of Jean Walsh. The matter was discussed at various Board meetings throughout the summer of 1981. During these meetings, only the religious aspect of the statute was discussed. At no time did any Board member avow any secular purpose for the moment of silence. It is clear that the defendant Board members and the other persons

who attended the Board meetings in the summer of 1981, perceived the sole purpose of § 22-5-4.1, NMSA 1978, to be to permit prayer in the public schools.

Superintendent Stablein was initially opposed to the implementation of § 22-5-4.1. Stablein believed the law to be improper in that it authorized prayer in public schools. He was also concerned about the dispute in which the Board was likely to become embroiled. A school bond election was about to be held, and Stablein was concerned that the school prayer issue would sublimate the bond issue; he did not want to "miff" the voters on the eve of the bond election.

The testimony of the Board members themselves makes clear that they had no secular purpose in implementing the moment of silence. The Board members who voted to implement the exercise did so only because of the pressure being exerted on them by constituents who favored prayer in public schools. While it perhaps cannot be said that the Board members favored prayer in public schools as an abstract proposition, it is clear that they intended to implement a program of prayer in the schools in order to avoid the political wrath of their constituents.

The Board members now say that their purpose in implementing the moment of silence was to enhance discipline and instill in the students the "intellectual composure" necessary for effective learning. These justifications are clearly the product of afterthought. They are no more than an elaborate effort to inject a secular purpose into a clearly religious activity. There is no credible evidence before the Court to support the defendants' contention.

These justifications were never uttered publicly at the Board meetings at which the moment of silence was discussed. It is unlikely that the moment of silence carries any significant benefits to the educational process, and it is clear that the benefits the Board claims to have been seeking could have been accomplished by means other than the moment of silence. Add to this the fact that no moment of silence was ever considered by the Board prior to the enactment of H. B. 205, despite the educational benefits the defendants now claim arise from the moment of silence. It is clear that the educational benefits alleged by the Board members are a mere pretext. Their purpose was to institute a devotional exercise in public school classrooms.

The Court finds that the primary effect of § 22-5-4.1 and its implementation by the Las Cruces Board of Education is to advance religion. It is clear that the Legislature intended the moment of silence to be a devotional exercise. It was regarded as such by both the Board members and the members of the community who spoke at the meetings where it was discussed. The memorandum advising parents of the implementation of the program could also be understood as stating that a voluntary, silent devotional exercise was to be instituted in the public schools.

It does not matter whether the moment of silence would be regarded as a proper devotional exercise by a cleric or another person knowledgeable in such affairs. The ill lies in the public's *perception* of the moment of silence as a devotional exercise. If the public perceives the State to have approved a daily devotional exercise in public school classrooms, the effect of the State's action is the advancement of religion.

The dangers inherent in the sovereign placing its imprimatur on a religious exercise are particularly acute where children are involved. As established by Gordon Cawelti, an expert in the fields of curriculum and discipline, children are extremely impressionable and easily influenced. They exhibit a tendency to conform with each other in dress and behavior, and it is psychologically disturbing for a child to be different from his peers. There is a clear and present danger that the children will perceive the moment of silence as government approval of religion.

The fact that § 22-5-4.1 allows not only prayer, but also meditation and contemplation is of no moment. It cannot be seriously argued and certainly cannot be assumed that school children can discern the nice distinctions concerning the meanings of "meditation," "contemplation" and "prayer."

As discussed above, the Board discussions which preceded implementation, as well as the communications announcing implementation of the moment of silence, left the clear impression that school prayer was the issue. The manner of conducting the moment lends further support to this impression. Under the regulations approved by the Board, the moment of silence is required to occur as soon as possible after the tardy bell. No leeway is allowed which would permit its observance at any other time. If the moment of silence were meant to instill discipline and intellectual composure, such regulations would be inappropriate. Instead, teachers would have the option of invoking the moment of silence before each class, after each recess, or after the students return from lunch. The fact that the moment of silence is rigidly held at the

same time every day suggests to the public that it has no disciplinary or educational significance.

The defendants' expert witnesses concede that there has been no meaningful research on the practical effects of the moment of silence on the educational process. The Court finds that there are no significant educational benefits from the moment of silence as implemented by the defendants. The evidence to the contrary is entitled to no weight in the view of the Court. The marginal benefits that may be realized are clearly outweighed by the danger in the public's perception of the moment of silence as a State-approved religious activity.

The moment of silence as implemented by the defendants requires a good deal of governmental involvement in the act of prayer which would not exist had § 22-5-4.1 not been instituted. The exercise is undertaken on school grounds during school hours. Teachers have the duty to maintain silence by all of the students, and to insure that no other activities are undertaken. The Superintendent of Schools and, ultimately, the Board are responsible for seeing that Board policies, including the moment of silence, are carried out in the classrooms of the District.

It is clear that the moment of silence has caused a good deal of political divisiveness, much of which is along sectarian lines in the community, and has the potential to cause a good deal more. During the time immediately preceding the adoption of the moment of silence, a concerted effort in favor of adoption was conducted by local religious groups. The effort included petition drives by local churches and an impressive letter-writing campaign. It is, of course, signficiant that the proponents of adoption regarded § 22-5-4.1 as a

method of instituting prayer in the public schools. The opponents were less organized, but they did exist. Their uncoordinated efforts were to little avail, and their protests were overwhelmed by the religious groups' campaign to adopt the moment of silence.

The matter was certainly divisive within the school system itself. A poll was conducted among the student councils and the teachers to determine their views on the matter. Although the members of student councils cannot be considered a truly representative sample for determining student attitudes, the Court finds it significant that 27% of the students polled were against implementation of the moment of silence. Even more unsettling is the fact that the teachers polled disapproved of the moment of silence by a margin of 47.26% to 42.36%. Indeed, at least four teachers have refused to conduct the moment of silence in their classrooms.

The Superintendent is aware that there are teachers in the District who refuse to conduct the moment of silence. Their refusal is punishable as a failure to follow Board policy. Defendant Stablein decided that, for the time being, there would be no disciplinary action against these teachers. However, it is clear that future action against there teachers is not foreclosed.

The most compelling evidence of political divisiveness, however, came from the Board members themselves. It is clear that their concern about the upcoming bond election was a major factor in their decision to implement § 22-5-4.1. They worried that the voters would not consider the substantive merits of the bond proposal, but would instead cast their votes along sectarian lines de-

pending on the Board's decision on the moment of silence. Thus, they were concerned that school prayer would be the dominant issue in the bond election. In order to avoid that possibility, they instituted the moment of silence. By so doing, they refused to independently judge the secular merits of the moment of silence proposal and willingly submitted to the religious arguments.

The moment of silence was observed in District schools beginning on October 12, 1981. Each of the 16,000 students in District schools is affected. Although the program was allegedly adopted on a "trial basis," there is no indication that the program will be voluntarily discontinued.

CONCLUSIONS OF LAW

The plaintiff brings this action under 42 U. S. C. § 1983 to redress the violation, under color of state law, of rights guaranteed to him by the Constitution of the United States and the Constitution of the State of New Mexico. He seeks injunctive relief under § 1983 and declaratory relief under 28 U. S. C. § 2201. The Court has jurisdiction over the subject matter under 28 U. S. C. § 1343 (3).

The most commonly recognized purpose of the First Amendment is to prevent any single denomination from being established as a state church. *Everson v. Board of Education*, 330 U. S. 1, 8 (1947); *Beck v. McElrath*, No. 82-3577, slip op. at 4 (M. D. Tenn., Oct. 7, 1982). However, the protection of the First Amendment does not stop there. Not only is the State prohibited from adopting a state religion, but also from passing any law

relating to the establishment of religion. The Supreme Court has made clear the scope of the prohibition.

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining, or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Everson, supra at 11.

In the recent past, the Supreme Court has considered a number of cases touching upon issues similar to those in this case. These cases have resulted in a three-prong analysis which may be stated as follows.

> [T]o pass muster under the Establishment Clause the law in question first must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion.

Committee for Public Education v. Nyquist, 413 U. S. 756, 774 (1973). *See also Lemon v. Kurtzman,* 403 U. S. 602, 612-613 (1971).

In this case, the plaintiff challenges § 22-5-4.1, NMSA 1978, under the Establishment Clause. The Court finds that § 22-5-4.1 does in fact violate the Establishment Clause of the First Amendment.

Establishment Clause

Secular Legislative Purpose

The first inquiry in the Establishment Clause analysis goes to the purpose of the legislature in adopting § 22-5-4.1. Based on the Court's findings of fact, it must be concluded that the legislature had no clearly secular purpose in adopting the law. Having failed to pass the first test of the *Lemon v. Kurtzman* analysis, the law must be deemed unconstitutional irrespective of the two remaining tests, which also will be addressed below. *Stone v. Graham,* 449 U. S. 39 (1980).

Of course, both the defendants and the legislative sponsors of the statute deny that they acted with a religious purpose. The evidence indicates otherwise.

> At the core of the Establishment Clause is the requirement that a government justify in secular terms its purpose for engaging in activities which may appear to endorse the beliefs of a particular religion. Although courts have rarely looked behind the stated legislative purposes, it is clear that an avowed secular purpose, if found to be self-serving, may "not be sufficient to avoid conflict with First Amendment." *Stone v. Graham,* 449 U. S. 39, 41 (1980).

American Civil Liberties Union v. Rabun County Chamber of Commerce, 678 F. 2d 1379, 1390 (11th Cir. 1982).

In this case, the legislative avowals of secular purpose are clearly self-serving and the Court is not bound

by them. *Karen B. v. Treen*, 653 F. 2d 897 (5th Cir. 1981); *Hall v. Bradshaw*, 630 F. 2d 1018 (4th Cir. 1980); *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E. D. Ark. 1982). In determining the true purpose of the legislature, the most appropriate starting place is the statute itself.

The presence of the word "prayer" in § 22-5-4.1 is compelling evidence that there was no secular purpose sought to be achieved. As the court observed in *Karen B. v. Treen*,

> the plain language of [the challenged statutes] makes apparent their predominantly religious purpose. Prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a signficant role in the devotional lives of most religious people. Indeed, since prayer is a primary religious practice in itself, its observance in public school classrooms has, if anything, a more obviously religious purpose than merely displaying a copy of a religious text in a classroom.

653 F. 2d at 901.

The defendants, of course, argue that the words "contemplation" and "meditation" indicate a neutral purpose, and even legislative senstitivity to the people's right to freedom of religion. *See Gaines v. Anderson*, *supra*. The Court cannot accept this characterization. As discussed in the findings of fact, the Court views the inclusion of these words as a transparent ruse meant to divert attention from the statute's true purpose. Viewed in this light, it can hardly be said that the statute reflects sensitivity to the right to religious freedom. Indeed, it reflects the opposite. The inclusion of the words "contemplation" and "meditation" indicates that the leg-

islature knowingly set out to denigrate the right to freedom of religion, and then sought to conceal the result by including these so-called alternatives to prayer. *See, e.g., Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F. 2d 1038 (5th Cir. 1982) (school gatherings for "educational, moral, religious or ethical" purposes found unconstitutional); *Beck v. McElrath, supra*. The plain language of the statute indicates a religious purpose.

In addition to the statutory language, the courts may consider other factors in determining legislative purpose. Matters such as the historical context of the statute, the events leading up to passage of the act, and the contemporaneous statements of the legislative sponsors may be considered. *McLean, supra* at 1263-1264. In this case, these factors completely undercut the defendants' arguments. As indicated in the Court's findings of fact, the events preceding adoption of the moment of silence and the statements of the legislative sponsors clearly indicate that the purpose of the statute was to return prayer to the schools.

The defendants next argue that as long as some identifiable secular purpose is served by the statute, it does not run afoul of the Establishment Clause even if there is also a religious purpose. The authority for this proposition is mysterious at best.

The Court has found that no secular purpose is served by the statute. But even if there were such a secular purpose, it is clear that the defendants misapprehend the law. "[T]he state cannot escape the proscriptions of the Establishment Clause merely by identifying a bene-

ficial secular purpose. The inquiry goes beyond this." *Hall v. Bradshaw*, 630 F. 2d at 1020. If the State could avoid the application of the First Amendment in this manner, "any religious activity of whatever nature could be justified by public officials on the basis that it has beneficial secular purposes." *DeSpain v. DeKalb County Community School District*, 384 F. 2d 836, 839 (7th Cir. 1967). *See also American Civil Liberties Union v. Gallatin Area School District*, 307 F. Supp. 637, 641 (W. D. Pa. 1969). The defendants' argument is without merit.

Finally, the defendants argue that their purpose was merely to accommodate the exercise of the children's right to freedom of religion. *See Lanner v. Wimmer*, 662 F. 2d 1349, 1357 (10th Cir. 1981). *Lanner* is inapposite. *Lanner* involved a released-time program which allowed students to attend religious classes offered by private entities off school grounds. Such programs are considered an accommodation of religion. *See Zorach v. Clausen*, 343 U. S. 306 (1952). The defendants apparently argue that a religious activity undertaken on campus, during school hours and under the supervision of teachers paid by the State is the equivalent of the program at issue in *Lanner*. That is clearly not the case. Here, the moment of silence goes far beyond a mere accommodation of the public's right to worship as it pleases. It establishes a devotional exercise on school grounds during school hours with teacher supervision. Far from being an accommodation of religion, it is an establishment of religion with the added element of being compulsory.

The Court concludes that § 22-5-4.1 was enacted and implemented for a religious purpose by the Legislature

and the Board. The statute is therefore unconstitutional and its implemenation illegal.

Primary Effect of Statute

In order to survive the Establishment Clause, a statute must have a primary effect which neither inhibits nor advances religion.

> [R]eligious activity under the aegis of the government is strongly discouraged, and in some circumstances—for example, the classroom—is barred. The sacred practices of religious instruction and prayer, the Framers foresaw, are best left to private institutions—the family and houses of worship.

Brandon v. Board of Education, 635 F. 2d 971, 973 (2d Cir. 1980). The Court concludes that the primary effect of the enactment and implementation of § 22-5-4.1 is advancement of religion.

In analyzing this matter, it must always be remembered that we are dealing with children attending public schools. As the Second Circuit Court of Appeals has observed:

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.

Id. at 978.

In this case, the danger is clear. The debates leading to the adoption of the moment of silence left the clear impression that the issue was prayer in the public schools

in the minds of both its supporters and opponents. Once the moment of silence was adopted, the policy of allowing prayer at the beginning of each school day "implies recognition of religious activities . . . as an integral part of the District's . . . program . . . ." *Lubbock Civil Liberties Union, supra,* 669 F. 2d at 1045.

> This, in combination with the impressionability of secondary and primary age schoolchildren and the possibility that they would misapprehend the involvement of the District in these [matters], renders the primary effect of the policy impermissible advancement of religion.

Id. To like effect, *see Brandon, supra,* 635 F. 2d at 973.

The Establishment Clause protects against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission,* 397 U. S. 664, 668 (1970). Here, the State has chosen to sponsor and actively involve itself in the matter of prayer. "A prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect." *Hall, supra,* 630 F. 2d at 1020. By authorizing a time for prayer in the classrooms, the defendants have placed the imprimatur of the State on that religious activity. In so doing, they have impermissibly advanced religion. No other significant secular effects are present, the Court having rejected the testimony of Dr. Thomas Thompson. It is clear, therefore, that the primary effect of § 22-5-4.1 and its implementation is the advancement of religion. The statute is unconstitutional and its implementation is illegal.

Excessive Entanglement

The third inquiry in the three-prong Establishment Clause analysis is whether the challenged activity fosters an excessive entanglement of church and state. In this case, it is clear that there is such excessive entanglement.

The moment of silence is intended to provide a time, place and atmosphere for prayer. The time chosen is during school hours, and the place is the school grounds. The atmosphere of silence is instilled and maintained by the teachers. These facts alone have been found sufficient to constitute excessive entanglement. *Brandon, supra* at 979; *Karen B., supra* at 903; *Lubbock Civil Liberties Union, supra.* Here, there is an even greater entanglement. The Superintendent is obligated to enforce the policies of the Board, including the moment of silence. He is responsible for ensuring that District teachers observe the moment of silence. The Superintendent, in turn, answers to the Board. The Board is ultimately responsible for enforcement of the moment of silence policy.

As the Supreme Court observed in *Lemon v. Kurtzman, supra,* "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." 403 U. S. at 620-621.

The Court's conclusion is further supported by the evidence of political divisiveness. Both students and teachers are sharply divided over the moment of silence. Feelings ran high in the community, particularly among the proponents of adoption. Board members feared that refusal to adopt the moment of silence would result in the

defeat of their bond proposal, a matter which should have been completely unrelated to the moment of silence.

> A broader base of entanglement of yet a different character is presented by the divisive potential of these state programs. . . . It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith. Ordinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.

Lemon, supra, 403 U. S. at 622.

Any government activity with "the potential for impermissible fostering of religion" can cause the sort of divisiveness the Establishment Clause was meant to guard against. *Id.* at 619.

> By placing its imprimatur on the particular kind of belief embodied in prayer, the state necessarily offends the sensibilities not only of nonbelievers but of devout believers among the citizenry who regard prayer "as a necessarily private experience." (Citation omitted.)

Hall v. Bradshaw, supra, 630 F. 2d at 1021. In this case, the moment of silence clearly has the potential for impermissibly fostering religion, and it has caused precisely the sort of political divisiveness along sectarian lines which the Establishment Clause was designed to avoid. *See Lemon, supra,* at 622; *Committee for Public Education v. Nyquist,* 413 U. S. at 794-798.

The Court therefore concludes that § 22-5-4.1 as implemented by the defendants causes excessive entangle-

ment between church and state. The statute is therefore unconstitutional and its implementation by the defendants illegal.

The defendants seem to argue at several points that the encroachment on the plaintiff's rights is minor because the decision of whether to pray during the moment of silence is left with the students. It is well-settled that voluntary exercises are not beyond the reach of the Establishment Clause. *See School District of Abington Township v. Schempp*, 374 U. S. 203 (1963); *Engel v. Vitale*, 370 U. S. 421 (1962); *Lubbock, supra; Karen B., supra; Collins v. Chandler Unified School District*, 644 F. 2d 759 (9th Cir. 1981). And, the fact that some might regard the encroachment on religious freedom in this case to be minor is no defense. *Stone v. Graham*, 449 U. S. 39 (1980).

> The Supreme Court has rejected the argument that relatively minor encroachments may escape scrutiny under the Establishment Clause, for "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *Abington School District v. Schempp*, 374 U. S. 203, 225 (1963).

Hall v. Bradshaw, supra at 1021. Although the encroachment may seem minor to some, it violates the Establishment Clause nonetheless.

Free Exercise of Religion Clause

The plaintiff also claims an encroachment on his right to freely exercise his own religion. While the coercive effect of the moment of silence is clearly present, plaintiff has failed to prove that he or his minor son have been denied the right to freely exercise their religion.

On the record, therefore, it cannot be said conclusively that the moment of silence violates the Free Exercise Clause of the First Amendment.

Defendants' Request for Declaratory Judgment

The defendants have counterclaimed for declaratory relief. The defendants seek a judgment declaring that they have an inherent right, apart from § 22-5-4.1, to institute a program of daily periods of silence as a means of encouraging discipline and intellectual composure, and that such a program does not offend either the federal or state constitutions. In addition, the defendants ask the Court to declare that they may continue the moment of silence regardless of the constitutionality of § 22-5-4.1 so long as prayer is neither suggested nor encouraged. In light of the foregoing conclusions of the Court, this relief must be denied.

What the defendants seek, in essence, is an abstract declaration that the defendants could institute a moment of silence in the absence of § 22-5-4.1, assuming there was a secular purpose, a neutral effect, and no excessive entanglement. However, this abstract proposition cannot be divorced from the realities reflected in the Court's findings. The defendants basically ask the Court to declare that if the facts were different, the moment of silence would be lawful. This the Court cannot do.

It may be that a school board has the power to implement a moment of silence without § 22-5-4.1. But that is not the question before the Court. The defendants did not ground their authority in the Board's inherent powers. They relied on § 22-5-4.1. They did not adopt the program for purposes of intellectual composure or dis-

cipline. Instead, they acted with a religious purpose. Further, while one can conceive of facts indicating that a period of silence neither advances nor inhibits religion, in this case the public perceives the moment of silence as a means of instituting prayer in the public schools. The facts found by the Court are not the facts which are assumed in the defendants' request for declaratory relief.

The Court sees similar difficulties with a declaratory judgment which would allow the moment of silence to be continued even if § 22-5-4.1 is found unconstitutional. Indeed, the Court concludes that the defendants must be permanently enjoined from instituting any program similar to the moment of silence. The reasons therefor are clear.

If the defendants are not so enjoined, the moment of silence issue could well be brought before them again. But the defendants would be more careful to disguise their purpose the next time. With a wink and a nod, they could discuss the secular purposes for the moment of silence, and prohibit any mention of the school prayer issue. Having avoided the factors which lead the Court to rule against them in this case, they could reinstitute the moment of silence.

It would be inimical to allow such a situation to develop. The Court believes that the defendants wish to follow the law. But being human, they might well again accede to constituent pressure and adopt a reworked moment of silence. This reworked moment of silence, free from the patent defects which render it unconstitutional in this case, could not, in the view of the Court,

be separated in the mind of the public from the exercise which the Court today finds unconstitutional.

The Court must, therefore, prohibit any future implementation of the moment of silence. This will guarantee that the defendants will not again be pressured into adopting such a program, and insures the integrity of the holding of the Court. It would be a total and inescapable contradiction for the Court to say that § 22-5-4.1 is unconstitutional on the one hand, and on the other to say that an identical program instituted in the wake of the finding of unconstitutionality is valid.

The Court must therefore deny the defendants the relief they have requested, and the counterclaim will be dismissed.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The enactment of § 22-5-4.1, NMSA 1978, by the Legislature of the State of New Mexico exceeds the scope of legislative power as circumscribed by the First and Fourteenth Amendments of the United States Constitution;

2. Section 22-5-4.1, NMSA 1978, and its implementation in the Las Cruces Public Schools violates the First Amendment of the United States Constitution;

3. Section 22-5-4.1, NMSA 1978, and its implementation in the Las Cruces Public Schools violates Article II, Section 11 of the Constitution of the State of

New Mexico in that it gives a preference by law to a particular mode of worship;

4. The defendants shall be enjoined from conducting the minute of silence described in § 22-5-4.1, NMSA 1978, both now and in the future; and

5. The defendants shall take nothing on their counterclaim, and that counterclaim should be dismissed.

A Permanent Injunction, Declaratory Judgment and Final Judgment shall be entered concurrently herewith.

DATED this 10th day of February, 1983.

/s/ Juan G. Burciaga
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 81-876-JB

JERRY DUFFY, on his own behalf and as next friend of John P. Duffy, his minor son,

Plaintiff,

vs.

LAS CRUCES PUBLIC SCHOOLS, et al.,

Defendants.

PERMANENT INJUNCTION,
DECLARATORY JUDGMENT
AND
FINAL JUDGMENT

(Filed February 10, 1983)

THIS MATTER came before the Court for a trial on the merits, and having considered the evidence adduced at trial, the pleadings and memoranda submitted by the parties, and being otherwise fully advised in the premises, the Court concludes that the plaintiff has proven a claim for relief.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The Court has jurisdiction over the subject matter pursuant to 28 U. S. C. § 1343(3);

2. The Court has jurisdiction over the parties;

3. Section 22-5-4.1, NMSA 1978, and its implementation by the defendants violates the First Amendment to the United States Constitution;

4. Section 22-5-4.1, NMSA 1978, and its implementation by the defendants violates Article II, Section 11 of the New Mexico Constitution;

5. The defendants, their agents, employees and successors shall be, and hereby are, permanently enjoined from conducting, allowing or authorizing the minute of silence as described in § 22-5-4.1, NMSA 1978, in public school facilities;

6. The defendants, their agents, employees and successors shall be, and hereby are, permanently enjoined from conducting, allowing or authorizing any exercise of a kind or nature similar to the minute of silence described in § 22-5-4.1, NMSA 1978, in public school facilities;

7. The plaintiff is entitled to reasonable attorneys fees under 42 U. S. C. § 1988, and to the costs incurred in pursuing this action, and counsel for the plaintiff is ordered to submit, in affidavit form, a statement in accordance with *Francia v. White,* 594 F. 2d 778 (10th Cir. 1979), for the consideration of the Court; and

8. The defendants shall take nothing on their counterclaim against the plaintiff, and the counterclaim is hereby dismissed with prejudice.

DATED this 10th day of February, 1983.

/s/ Juan G. Burciaga
United States District Judge

UNITED STATES COURT OF APPEALS

Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

April 8, 1983

(Received April 11, 1983)

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Clerk

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Honorable Juan C. Burciaga
United States District Judge
P. O. Box 67
Albuquerque, New Mexico 87501

Simons, Cuddy & Friedman
444 Galisteo
#B
Santa Fe, New Mexico 87501

Re: No. 83-1414, State of New Mexico, etc. v. Burciaga, etc.

Dear Sirs:

Enclosed is a copy of an order entered today in the captioned cause.

Very truly yours,

HOWARD K. PHILLIPS
Clerk

By: /s/ Robert L. Hoecker
Chief Deputy Clerk

RLH:cb
Enclosure

MARCH TERM - APRIL 8, 1983

Before Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges.

No. 83-1414

STATE OF NEW MEXICO, ex rel. "ONE MINUTE OF SILENCE" STATUTE, et al.,

Petitioners,

vs.

JUAN C. BURCIAGA, U. S. District Court Judge for the District of New Mexico,

Respondent.

This matter comes on for consideration of the petition for writ of prohibition in the captioned cause.

Upon consideration whereof, the petition is denied.

HOWARD K. PHILLIPS
Clerk

By: /s/ Robert L. Hoecker
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 81-0876

JERRY DUFFY, on his own behalf and as next friend of JOHN P. DUFFY, his minor son,

Plaintiffs,

vs.

LAS CRUCES PUBLIC SCHOOLS - 2; JOHN E. STABLEIN, Superintendent Las Cruces Public Schools; JOAN M. PUCELIK; WALTER L. RUBENS; VINCENT BOUDREAU; MRS. TOM SALOPEK; and EVERETT CRAWFORD, in their official capacities as members of the Board of Education of the Las Cruces Public Schools,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

(Filed October 19, 1981)

Plaintiffs bring this action to protect their rights under the First Amendment to the United States Constitution, Article II § 11 and Article XII, § 9 of the New Mexico Constitution, and § 22-13-15A (N. M. S. A. 1978 Comp.), and seek a judgment from this Court declaring House Bill 205, enacted during the 1981 New Mexico legislative session, unconstitutional, and enjoining defendants from instituting the provisions of House Bill 205 in any and all schools within the Las Cruces Public Schools - District 2, (hereinafter the "District").

In September, 1981, the Las Cruces Board of Education (hereinafter the "Board") directed JOHN E. STAB-

LEIN, Superintendent of the Las Cruces Public Schools, to implement House Bill 205 in the Las Cruces Public Schools on a trial basis. House Bill 205 provides:

> "Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken."

JURISDICTION

1. This Court has jurisdiction over Plaintiffs' claim for relief pursuant to:

a. 28 USC § 1343 (3)

b. 28 USC § 1331

c. 28 USC § 2201

d. 28 USC § 2202

e. pendant jurisdiction for all claims arising under state law.

PLAINTIFFS

2. Plaintiff, JERRY DUFFY, is a citizen of New Mexico and a taxpayer. He brings this action on his own behalf as a taxpayer whose taxes support the District. He also brings this action on behalf of, and as next friend of his minor son, JOHN P. DUFFY.

3. Plaintiff, JOHN P. DUFFY, a minor, is a citizen of New Mexico and attends a public school within the District. He is represented in this action by his parent and next friend, JERRY DUFFY.

DEFENDANTS

4. The District administers a portion of New Mexico's public school system.

5. Defendant, STABLEIN, is the Superintendent of the District and has administrative and supervisory functions over the Board and all public schools within the District and all property belonging to or in the possession of the District.

6. The individually named defendants in this action constitute the Board of Education for the District, and as such, have the legal responsibility to supervise the public schools in the District. These individually named defendants are sued in their official capacities.

FACTS

7. The New Mexico Legislature, during its 1981 session, passed House Bill 205 which provides for the authorization by each local school board, of a period of silence at the beginning of the school day, to be used for contemplation, meditation, or prayer.

8. The District instituted a period of silence to be used for contemplation, meditation or prayer, within the public schools on October 12, 1981 on a trial basis.

9. Such action, under color of state law, is an unconstitutional establishment of religion because of each of the following reasons:

a. it serves no secular end which could not be achieved by secular means:

b. its primary effect is one which advances religious doctrine within the public schools;

c. it fosters excessive governmental entanglement with religion; and

d. it authorizes the use of public buildings for the advancement of religious doctrine.

10. Parents who send their children to a public school, rather than to a parochial school, rightfully expect that the public school will be wholly secular and that the state will not promote one religion over another, or promote religion over no religion.

11. Prayer is a primary religious activity in itself, and its observance in public school classrooms has an obviously religious purpose.

12. The legislature's and the District's provisions for excusing students who do not desire to participate in the daily period of silence betray its recognition of the fundamentally religious character of the exercise.

13. The statute and regulations promote religion by encouraging observance of a religious ritual in the classroom.

14. The statute itself makes inappropriate governmental involvement in religious affairs inevitable. The period of silence takes place on school property during regular school hours. Classroom teachers are compelled, by the District, to conduct the observance, monitor the daily classroom activities, insure that no activities are undertaken, either by those wishing to pray, or by those not wishing to pray, and to enforce the one minute time limitation.

15. The observance of the period of silence on public property is violative of the establishment and free exercise clauses of the First Amendment to the United States Constitution.

16. Defendants' use of public property for sectarian purposes violates Plaintiffs' rights under the First Amendment to the United States Constitution, and such rights are in immediate and genuine jeopardy. House Bill 205 and its enforcement by defendants causes plaintiffs to suffer immediate, substantial and irreparable harm and loss of their constitutional rights for which there is no adequate remedy at law.

17. The observance of the period of silence in the public school rooms of the District is violative of § 22-13-15A, N. M. Stat. Ann. (1978), which provides that sectarian doctrine shall not be taught in a public school.

18. The observance of the period of silence in the public school rooms of the District is violative of the New Mexico Constitution, Article II, § 11 and Article XII, § 9 which prohibits requiring any support of a religious sect or denomination and attendance or participation in religious services by teachers or students.

CLAIM FOR RELIEF

19. Plaintiffs' claim for relief is brought pursuant to 42 U. S. C. § 1983. Plaintiffs seek to redress the loss of rights secured them by the First and Fourteenth Amendments to the United States Constitution and Article II, § 11 and Article XII, § 9 of the New Mexico Constitution and §22-13-15A, N. M. Stat. Ann. (1978). Plaintiffs seek injunctive and declaratory relief on the grounds that House Bill 205 is unconstitutional, and that the defend-

ants' practices and policies are causing plaintiffs, and will continue to cause plaintiffs, to suffer irreparable injury and deprivation of their constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray the Court to:

1. Assume jurisdiction of this cause and advance it upon the Court's calendar;

2. Issue final declaratory relief pursuant to 28 U. S. C. §§ 2201 and 2202, declaring that House Bill 205 and its institution within the classrooms of the District is unconstitutional under both the Federal and New Mexico Constitution and a violation of state statute.

3. Issue preliminary and permanent injunctive relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining the Defendants, and all persons acting in concert with them, from authorizing and instituting a period of silence within the public schools of the District.

4. Award plaintiffs their costs and attorney's fees and grant plaintiffs such additional relief as to the Court seems proper.

Respectfully submitted,

SAENZ & GONZALES

By /s/ Dan A. Gonzales
and
/s/ Angel L. Saenz,
Co-operating attorneys for the American Civil Liberties Union of New Mexico,

300 East Griggs,
Las Cruces, NM 88001
505/523-8504

Raymond W. Showers,
Legal Director
ACLU of New Mexico

P. O. Box 1945
Albuquerque, NM 87103
505/842-8200

STATE OF NEW MEXICO)
)
COUNTY OF DONA ANA)

JERRY DUFFY, being duly sworn, says he is the plaintiff herein, has read the foregoing Complaint for Declaratory and Injunctive relief and knows the content thereof, and the statements contained therein are true.

/s/ Jerry Duffy

SUBSCRILED AND SWORN TO here on this 19th day of October, 1981.

/s/ Angel L. Saenz
Notary

My Commission Expires September 28, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 81-0876

JERRY DUFFY, et al.,

Plaintiffs,

vs.

LAS CRUCES PUBLIC SCHOOLS,

Defendants.

PLAINTIFFS' REQUESTED FINDINGS OF FACT

(Filed October 13, 1982)

1. The Court has jurisdiction over the claims brought herein.

2. Plaintiff, Jerry Duffy, is a tax payer and a citizen of New Mexico, and thus has standing to bring this cause of action;

3. Plaintiff, John Duffy, is a minor, a citizen of New Mexico and attends public school within the Las Cruces Public School District.

4. The Las Cruces Public School District administers a portion of New Mexico's Public School System.

5. Defendant, Stablein, was the Superintendent of the District and had administrative and supervisory functions over all public schools within the district and all property belonging to or in the possession of the district, at the time of the decision to implement the period of silence.

6. Defendants, Pucelik, Reubens, Boudreau, Salopek, and Crawford constitute the Board of Education of the

Las Cruces Public Schools and are sued in their official capacities only.

7. The Board of Education has the legal responsibility to supervise and control the public schools in the district.

8. The New Mexico Legislature, during its 1981 session, passed House Bill 205, codified as § 22-5-4.1, N.M.S.A. (1978), which provides:

> "Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, medication, or prayer, provided that silence is maintained and no activities are undertaken."

9. The Defendants instituted a period of silence, pursuant to § 22-5-4.1, N.M.S.A. (1978), on October 12, 1981.

10. The implementation of the period of silence within the district was action taken or approved by the Defendants in their official capacities and under color of state law.

11. Prayer is a religious activity.

12. The period of silence takes place on school property during regular school hours.

13. Classroom teachers are responsible for maintaining silence and insuring that no activities are undertaken.

14. § 22-5-4.1, N.M.S.A. (1978), was enacted and implemented to authorize prayer in the public schools.

15. Observation of the moment of silence in the classrooms of the Las Cruces Public Schools is not voluntary.

16. Students pray during the moment of silence.

17. The moment of silence is observed by teachers as well as students.

18. The moment of silence is observed only in the morning, immediately after the tardy bell.

19. The moment of silence is not supported by any secular interest groups.

20. The moment of silence is supported by sectarian interest groups.

21. Students perceive the moment of silence as a religious activity.

22. Students and parents of students in the Las Cruces Public Schools believe that the Las Cruces Public Schools will provide a time, a place, and support for prayer.

23. Students and parents of students were expressly informed that the students would be permitted to pray in the classrooms of the Las Cruces Public Schools.

24. Students and parents of students were expressly told that students who chose not to take part in the moment of silence would have to sit silently for one minute with no activities.

25. The moment of silence was not implemented by Defendants nor passed by the legislature for the purpose of providing and maintaining discipline in the public schools.

26. The moment of silence was not implemented by Defendants nor passed by the New Mexico Legislature to encourage intellectual composure among students.

27. A staff poll conducted by Defendants states that 47.26% of the public school staff opposed the moment of silence.

28. A student council poll, conducted by Defendants, states that 27% of the student councils opposed the moment of silence.

29. Las Cruces Public School teachers had the inherent authority to maintain silence in the classroom prior to the implementation of § 22-5-4.1, N.M.S.A. (1978).

30. Prayer advances religion.

31. Prayer is not necessary to maintain discipline in the classroom.

32. Prayer is not necessary to encourage intellectual composure among students.

33. School children are far less mature and intellectually developed than the public at large.

34. School children are unable to evaluate conflicting religious beliefs objectively.

35. School children are especially susceptible to being influenced in religious choice.

36. School children maintain a strong urge to conform to classmate's attitudes.

37. School children fear accusations of wanting to be different.

38. School children have a strong need to remain members of one's group.

39. School children are likely to do and say things in accordance with the majority even when convinced such things are wrong.

40. School children are compelled to attend school.

41. § 22-5-4.1 N.M.S.A. (1978), has no legitimate secular purpose.

42. The moment of silence has a principle or primary affect that advances or inhibits religion.

43. The moment of silence creates an excessive entanglement by the State with religion.

PLAINTIFFS' REQUESTED CONCLUSIONS OF LAW

1. § 22-5-4.1 N.M.S.A. (1978) and its implementation in the Las Cruces Public Schools violates the Establishment and/or Free Exercise Clauses of the First Amendment to the United States Constitution.

2. § 22-5-4.1 N.M.S.A. (1978) and its implementation in the Las Cruces Public School classrooms is violative of Article II, Section 11 of the New Mexico Constitution.

3. § 22-5-4.1 N.M.S.A. (1978) and its implementation in the Las Cruces Public School class rooms is violative of Article XII, Section 9 of the New Mexico Constitution.

4. § 22-5-4.1 N.M.S.A. (1978) and its implementation in the Las Cruces Public Schools classrooms is violative of § 22-13-15 (A), N.M.S.A. (1978).

Respectfully submitted,
Saenz, Gonzales & Ferreira

By: /s/ Dan A. Gonzales
Attorney for Plaintiffs
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(505) 523-8504

I hereby certify that a true and correct copy of the foregoing was mailed to Mr. Emery Cuddy on this 13 day of October, 1982.

/s/ Dan A. Gonzales

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-1414

STATE OF NEW MEXICO, ex rel.
"One Minute of Silence" Statute, et al.,

Petitioners,

vs.

JUAN C. BURCIAGA, U. S. District Court Judge
for the District of New Mexico,

Respondent.

PETITION FOR WRIT OF PROHIBITION
(Filed March 30, 1983)

COME NOW Petitioners, State of New Mexico, ex rel. "One Minute of Silence" Statute, and other Petitioners whose names and signatures appear at the conclusion of this Petition and apply for a Writ of Prohibition directed to The Honorable Juan C. Burciaga, U. S. District Judge for the District of New Mexico: For Writ of Prohibition prohibiting the execution and enforcement of a Permanent Injunction, Declaratory Judgment and Final Judgment entered on February 11, 1983, and prohibiting any proceeding for the enforcement of the payment of attorneys' fees and costs. Copy of the above and other documents are attached to this Petition.

STATEMENT OF FACTS

The Respondent entered an Order on February 11, 1983, entitled "Permanent Injunction, Declaratory Judgment and Final Judgment." A copy is attached as Exhibit 1.

On the same day, Respondent entered on the Docket a MEMORANDUM OPINION AND ORDER. A copy is attached as Exhibit 2. Exhibit 2 says this Memorandum Opinion shall constitute the Court's findings of fact and conclusions of law and is in 28 pages. The last page contains respondents statement of his Order.

The Order as contained in the Opinion, Exb. 2, p. 28, varies somewhat from the Injunction, Exb. 1. Prohibition is sought by Petitioner against all Orders of both documents including an award of attorney fees and costs, the amount of which had not yet been set by the Court. It was set on March 24, 1983, in the sum of $28,000.

That the Memorandum Opinion, Exb. 2, and the Permanent Injunction, Exb. 1, were stated in a cause of action by Jerry Duffy on his own behalf and as a next friend of John Duffy, his minor son, Plaintiff, and against the Las Cruces Public Schools and against the individuals on the Las Cruces New Mexico School Board and its Superintendent. (see page 2 of Exb. 2).

The Complaint was civil cause no. 81-876-JB filed in U. S. District Court for the District of New Mexico on October 14, 1981. A copy of said Complaint is attached as Exb. 3. That page 4 of the Complaint identifies the American Civil Liberties Union of New Mexico as being represented by the two plaintiffs' attorney and also contains an identification of one Raymond W. Schowers, Legal Director of ACLU of New Mexico. Mr. Schowers is a New Mexico attorney but is not identified as such. (Exb. 3, p. 4).

That paragraph 1 of the Complaint asks the Court to "assume jurisdiction of the cause". Petitioners herein

assert that no jurisdiction existed in the U. S. District Court and the Prohibition is an appropriate remedy.

That the sole issue in the U. S. District Court was the constitutionality of a New Mexico Statute passed by the legislature in 1981 and popularly identified a "Minute of Silence" which had been implemented in the Los Cruces New Mexico School District. The Statute reads as follows:

> Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken.

The Respondent declares that Statute unconstitutional, Exb. 1, 2, as in violation of the First Amendment to the U. S. Const. and also assumed jurisdiction to declare it unconstitutional as being in violation of the *New Mexico Constitution, Art. II, Sec. 11, 1978.*

The Complaint had requested the Federal Courts ruling of unconstitutionality as to *both* Constitutions and also as being in violation of a New Mexico Statute, Exb. 3.

That the Permanent Injunction issued not only declared the "minute of silence" law unconstitutional but also enjoined permanently "any exercise of any kind and nature similar to the "minute of silence" statute which respondent had just declared unconstitutional in a preceding paragraph. Exb. 1. In his 28 page Opinion which included his Findings of Fact and Conclusions of Law, respondent discussed his decision and immediately issued the Permanent Injunction. Exb. 1. A hearing with evidence had been conducted and was covered by the Opinion

with its Findings of Fact. Exb. 1. That although the Order mentions and condemns the "implementation of Sec. 22-5-4.1, the decree in sweeping terms condemns the Statute itself as unconstitutional and goes even further in his Injunction of permanently prohibiting "any exercise of a kind or matter similar to the minute of silence".

Petitioners assert the Opinion and Findings introduce new and unconstitutional methods of arriving at constitutionality vel non which methods are themselves unconstitutional.

Petitioners assert that they are American citizens, residents of the State of New Mexico, who should not be subjected to an Injunction enforceable by contempt while lengthier methods of redress are employed and which entitles them to seek relief from this court.

That the presence of the Injunction entitles them to be Petitioners herein as well as their status as described above.

BASIS FOR THE WRIT

Amendment X U. S. Const. guarantees to the "states" and "to the people," therein rights of self government. This includes necessarily the right to defend the sovereignty thus guaranteed. The Tenth Amend. phrases "and to the people" is a U. S. Constitutional recognition of the right "of the people" to defend that sovereignty which is everything not expressly delegated to the Federal government. The State has an equal right to defend that sovereignty. The Tenth Amend. authorizes this Petition of Citizens of New Mexico unanimously and or collectively. The government of the United States by the

enactment of the Bill of Rights assumed the duty of enforcing and protecting States' rights. Federal law has delegated to the Court the enforcement of the Tenth Amend. in this particular case since the State of New Mexico lies within the geographic jurisdiction of the U. S. Court of Appeals for the Tenth Circuit. This Petition State of New Mexico ex rel. N. M. S. 22-5-4.1 is by law (Rules of Appellate Procedure Rule 21) the legally designated forum for this Petition based on a lack of jurisdiction by the U. S. District Court. The Tenth Circuit Court of Appeals is also endowed with supervisory power over the U. S. District Court in New Mexico.

One main issue below is the declaration of unconstitutionality of New Mexico Statute, presumptively valid although qualified to petition this Court. This Injunction is the execution of the Declaration of Unconstitutionalities.

Because state tax funds are involved New Mexico law has already recognized individual taxpayers' suits, *Wiggs v. City of Albuquerque,* 57 N. M. 770, 263 P. 2d 963, based upon a claim of unconstitutionality.

As established by law this Court is the proper forum for the enforcement of Tenth Amendment rights howsoever it is presented. Prohibition is the appropriate remedy.

The Tenth Amendment expression "reserved to the people" expressly confers upon this Petition itself. "State of New Mexico ex rel "One Minute of Silence" the right of access to this Court for its protection and right to exist as a law of the State of New Mexico. The

"people" i. e. voters, residents, taxpayers, petition for the same "right of access".

That the Tenth Amendment by its expression "reserved to the people" expressly confers upon these Petitioners the right to access by this Court to prohibit the enforcement of the Permanent Injunction ordered by one Judge in the U. S. District Court in New Mexico.

The attack upon the "One Minute of Silence" law was initiated below by the American Civil Liberties Union, a national organization of some kind with a local chapter in New Mexico, Exhibit 3. Both attorneys signing the Complaint defined themselves as representatives of that entity. The caption was in the name of a father and son and the father signed the Complaint. Exhibit 3. In Plaintiffs Requested Findings of Fact there are several requests for the benefit of "all children", the welfare of which the Plaintiff below claimed to be advancing. No requests were made for the benefit of the sole "child plaintiff. The Requested Findings claimed benefit for "all New Mexico 'children' from the requested Injunction against "One Minute of Silence".

This Petition and all Petitioners claim a superior right to the ACLU to reinstate the State law and to represent the children of the State against an organization wrongfully purporting to advance the interests of "all" of its children.

The Risk Management Division of the State of New Mexico is a part of the Executive Department of the State whose duties are defined in N. M. S. 1978 15-7-1 et seq. and in general defends cases against the State and its subdivisions like the Las Cruces School Board which

it did in the Court below, through private attorneys. The attorneys preparing and signing this Petition did not participate below. All funds for the payment of any judgment in this case and costs and attorneys' fees came from taxes collected throughout the State. Said Risk Management Division through its trial attorney officially extended cooperation and help for a review of the Judgment and Injunction below by offering their files and trial transcripts and consultation. This cooperation was offered present attorneys on March 14, 1983 and confirmed in writing. The participation of the Risk Management Division of the State is as stated. For all the above the protection of the Court is sought for this Petition, properly identified as State of New Mexico ex rel "One Minute of Silence" with many individuals for themselves and children, voicing the Constitutional right of peaceful petitioning for the "redress of grievances". This is a defense of their Constitutional right to govern themselves with the powers reserved to them by the Tenth Amend. The American Civil Liberties Union can claim no such State of New Mexico rights.

ISSUES PRESENTED AND RELIEF REQUESTED

Petitioners claim:

1. Grave and irreparable harm is occurring at every moment the Permanent Injunction remains in force as to all branches of the government of the State of New Mexico and to all persons within the State of New Mexico, including all of its children and especially teachers, officials and pupils in Las Cruces.

2. That the assumption of jurisdiction by the U. S. District Court for the District of New Mexico violates

Art. III of the U. S. Const. because the Plaintiffs lack "standing" as a matter of law, since there was a total absence of allegations in the Complaint of "injury in fact" to the Plaintiffs, Exb. 3, p. 3, 4, and the Plaintiffs' Requested Findings, Exb. 4, p. 1-5, are minus any claim of injury in fact and the Court's Findings of Fact, Exb. 2, p. 1-28 are totally void of any "injury in fact" to the Plaintiffs.

3. That the assumption of and exercise of jurisdiction was in direct opposition to the ruling of the Supreme Court of the U. S. in *Valley Forge Christian College v. Americans United for the Separation of Church State Inc., et al.*, 102 S. Ct. 752, 758, — U. S. —, — L. ed. 2d —, in these words "But of one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States", p. 760.

4. That the Permanent Injunction and Final Judgment violates State of New Mexico sovereignty and is an encroachment upon the governmental powers of the State of New Mexico and the freedom of all of its inhabitants and threatens to do so forever in violation of the Tenth Amend. and Fifth Amend. in U. S. Const.

5. The Permanent Injunction below considered in its sweeping coverage of individuals and state government functions and in its ambiguous injunction against "allowing or authorizing any exercise of a kind or nature similar to the minute of silence" violates the U. S. Constitution.

6. That the Injunction and Final Judgment violates Art. II, Sec. 3 of New Mexico Const. which reads "The people of the state have the sole and exclusive right to

govern themselves as a free sovereign and independent state." That the alleged violation by a State Statute of the First Amend. right cannot be used to violate the above State of New Mexico Constitutional provision nor confer jurisdiction for an attempt to do so.

7. The broad scope of the Injunction and its vagueness and ambiguity about what is prohibited as something "similar" is backed up by the "contempt" power of the U. S. District Court is an ever continuing threat to the freedom of all people in New Mexico and to their Constitutional rights and motivates this request that the execution of the Permanent Injunction be prohibited at once.

8. That Prohibition is appropriate for lack of jurisdiction and for the exercise of the supervisory powers of this Court over the United States District Court for the District of New Mexico and an Appeal even with a Stay is not an adequate remedy because:

a. The threat to the freedom of the New Mexico government in all of its branches and to its people continues as an undecided issue during the lengthy appellate process.

b. The sovereignty of the State of New Mexico is threatened by the Injunction, meanwhile the government of the State and all its inhabitants are brought under the contempt power of the U. S. District Court which could be used retrospectively if the appellate process in the Tenth Circuit would affirm J. Burciaga and thereby reinstate his Injunction. The people of New Mexico and its government should not be required to live under that fear.

c. The injunction even if stayed on an Appeal would be an intimidating factor in the realization of the "Moment of Silence" and a deterrent to any planned use of the same in any school in New Mexico.

d. That an Appeal is not an appropriate procedure for the exercise of the supervisory power of this Court to enforce the mandatory rule of the Supreme Court of the United States in *Valley Forge Christian School v. Americans United for the Separation of Churches & State*, supra. Allowing litigation in the U. S. District Court below is in direct violation of the above rule and invokes the supervisory power of this Court thru Prohibition. New Mexico government institutions and its people are threatened and a direct violation of the "standing" requirement of Valley Forge is the direct cause. Prohibition is the only adequate remedy.

9. That because the Final Judgment states that attorneys fees will be assessed in favor of ACLU attorneys against the State of New Mexico funds which are collected entirely from its residents throughout the State, Prohibition is requested to bar the payment of said funds for services in litigation which the Supreme Court of the United States says cannot be litigated in United States courts.

10. That since the power of the Federal Judiciary has been used to terminate the "Moment of Silence" and since said termination is a violation of the Constitutional rights of New Mexico citizens thru a forbidden exercise of Federal jurisdiction anything less than the immediate restoration of the "Moment of Silence" would be inadequate. State governmental procedures should be allowed to function at once.

That the supervisory power of this Court is also invoked in this Court's ruling in *Citizens Concerned for Separation of Church & State v. City and County of Denver*, 628 F. 2d 1289 (1980) wherein Art. III, U. S. Const. makes "standing" a requisite to jurisdiction and the lack of "standing" below is not merely an error to be appealed but a rule violation calling for Prohibition in exercise of supervisory power. The foregoing case being based on Art. III, U. S. Const. is binding on all Courts of the 10th Circuit.

11. That the interpretation of unconstitutionality as N. M. S. 22-5-4.1 is a distortion of the truthful meaning of words resulting in an Injunction which was and is Rule by force rather than Rule by law.

12. That the results of the Opinion and Injunction upon Federal-State relationships are unconstitutionally manifest in violation of the Tenth Amend., U. S. Const., and Art. II, Sec. 3 of the New Mexico Const. which says "The people of the State have the sole and exclusive right to govern themselves as a free, sovereign and independent state".

13. An issue presented is whether the plaintiffs' Complaint and the Court's Opinion and Injunction are not an unconstitutional use of the First Amendment Establishment Clause as a means of violating the First Amendment "free exercise" of religion clause. Petitioners earnestly assert that it is and that no right exists in the American Civil Liberties Union to do so nor in the United States District Court to acquiesce and that its use which has resulted in unconstitutionally placing a burden upon those truly entitled to First Amendment merits immediate relief thru the Prohibition proceeding.

14. That the Final Judgment, Opinion and Injunction are violations of the Treaty of Guadalupe Hidalgo and New Mexico Constitutional Provisions based thereon.

15. That freedom of religion within the State of New Mexico has been violated.

16. That the Opinion adopts principles of Constitutional interpretation totally unprecedented and which became a usurpation of the Legislative function of the New Mexico State Legislature and of the Las Cruces School Board as one example of many to hold that a poll of teachers with a 47.26% to 42.36% disapproval result, Exb. 2, p. 11, as a factor in Constitutional determination is as unprecedented as it is unconstitutional. That a U. S. District Court has no legislative powers. Even if 22-5-4.1 was a Federal Statute, the Opinion would be a violation of the Separation of Powers provision of the U. S. Const. All the more, so is it unconstitutional to thus usurp New Mexico Legislative powers. The Opinion does so and violates the Tenth Amend., U. S. Const. and Art. II, Sec. 3 of the New Mexico Const. State officials cannot surrender sovereignty and the Tenth Amend. grants to the citizens of the State the right to protect their sovereignty in these words. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or* to *the people*." A U. S. District Court Judge in the State of New Mexico has all the limitations of the Tenth Amend.

17. That the Opinion is a document judicially placed against religion as it exists in New Mexico and its residents e.g. in speaking of the School Board, the Opinion, Exb. 2, p. 6, says "it is clear that they intended to im-

plement a program of prayer in the schools in order to avoid the political wrath of their constituents." It is totally unprecedented to determine the unconstitutionality of a State Statute by a finding like that. (The Opinion is the Court's Findings of Fact), Exb. 2, p. 1.

REASONS WHY THE WRIT SHOULD ISSUE

AN EXAMINATION OF THE COMPLAINT, THE PLAINTIFFS' REQUESTED FINDINGS OF FACT AND THE COURT'S FINDINGS OF FACT SHOWS A COMPLETE LACK OF ANY ALLEGATIONS OR FINDING OF "INJURY IN FACT" OR EVEN A PLAINTIFFS' REQUEST FOR A FINDING OF INJURY IN FACT.

An examination of the Complaint from which J. Burciaga issued his nullifying declaration of New Mexico Statute 25-5-4.1 clearly shows that the requisite of "injury in fact" is not met. Page 3 of the Complaint, para. 16, Exb. 3, says that the State Statute "cause plaintiffs to suffer immediate, substantial and irreparable harm and loss of their constitutional rights for which there is no adequate remedy at law". All of the foregoing allegations are legal assertions which do not even purport to allege "an injury in fact". The allegation of loss of constitutional rights is an assertion of what the Complaint is seeking to establish. That assertion is precisely what *Vally Forge,* supra, says *cannot* establish "standing" otherwise the Federal Judiciary becomes a house of Congress whereby opponents of existing Legislative Acts, presumptively valid, can be repealed by the Order of a Federal District Court. The Constitutional basis for the requisite of "injury in fact" is Art. III of

the U. S. Const. whereby the judicial power of the Federal judiciary is stated.

Turning from page 3 of the Complaint, Exb. 3, to page 4, we find the same wording of injury "the defendants practices and policies are causing plaintiffs and will continue to cause plaintiffs, to suffer irreparable injury and deprivation of their Constitutional rights". This is positively identified as non-compliance with Federal Court Jurisdiction under Art. III, U. S. Const. by *Valley Forge*, supra and its supporting cases.

The fact that the U. S. District Court granted standing by allowing the case to go to trial serves to furnish a greater basis for the lack of "standing" because he thereby gave the Plaintiffs a chance to produce evidence of "injury in fact" which they failed to do. Plaintiffs' Requested Findings of Fact are completely void of any request to find injury of any kind to any Plaintiff, father, son or ACLU. Exb. 4, p. 1-4. These are even greater reasons for the application of Art. III and *Valley Forge*, supra, and *Citizens United v. Denver*, supra, all calling for a refusal to allow these plaintiffs to litigate in Federal Court.

After the non-jury hearing, Judge Burciaga made Findings of Fact and Conclusions of Law which were integral with his Opinion. A minute line by line analysis of the Court's Findings and Conclusions and the entire Opinion shows no findings of "injury in fact" by anyone. Plaintiffs below therefore have had the benefit of a full scale attempt to show "injury in fact" and have come up with nothing. This complete zero on "injury in fact" invalidates the Injunction, the Final Judgment and ev-

erything connected therewith. There was no jurisdiction for any decree except Dismissal. Jurisdiction cannot be conferred and Art. III is mandatory and compelling upon the Federal Judiciary.

There is no mention at all of the father, Jerry Duffy, in the Opinion nor any attempt to assert for him "injury in fact". There is no mention of his son John Duffy either unless he is included within the term "children" as used on p. 8, Exb. 3. All children therefore without specifying anyone are found to be affected by the Statute on Silence. An analysis of this paragraph shows a complete failure to establish "standing" as laid down in *Valley Forge*, supra. In fact, it is an exact non-compliance with *Valley Forge*, supra and Art. III. Judge Burciaga cannot by his Findings force "children" into the litigation and make a justiciable case out of one when it does not exist. Judge Burciaga's feeling that children are impressionable is not a base for a clear violation of Art. III and *Valley Forge*, supra. On p. 758, *Valley Forge*, supra, says "Art. III requires the party *who invokes the Court's* authority to show that he personally has suffered some actual or threatened injury". Underlining supplied. Art. III and *Valley Forge*, supra, are not a document and decision to be evaded. "All children" did not invoke the Federal Court in New Mexico and cannot be forced into the litigation by a Court's Findings. On p. 8 reference is made to a "Gordon Carvelti, an expert in the fields of curriculum and discipline". If this is an attempt to show an evidentiary basis for actual injury, it fails under at least two essential principles. (1) the only conclusion he draws is that "children are extremely impressionable and easily influenced". Obviously, this could not be "ac-

tual injury" but is a mere statement of what a child is. The only basis for injury would be that a child is a child. (2) Children in the general sense cannot and did not "invoke the Court's authority". No mention of the straw plaintiff John Duffy appears in the case as a person with any "injury in fact" and therefore No Standing for the Duffys'. As to the UCLA, no Finding appears for them at all and the language of *Valley Forge*, supra, completely eliminates them as a conferring "standing" when it says "The Federal courts have abjured appeals to their authority which would convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders." Citing case. Were the Federal Courts merely funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums".

U. S. DISTRICT COURTS ARE LIMITED IN THE USE OF 42 U. S. C. 1983 TO TEST THE CONSTITUTIONALITY OF STATE STATUTES FOR ALLEGED FIRST AMENDMENT VIOLATIONS. THIS LIMITATION HAS BEEN EXCEEDED IN THIS CASE WITH RESULTING VIOLATIONS OF THE TENTH AMEND., U. S. CONST. AND LOSS OF STATE OF NEW MEXICO SOVEREIGNTY.

U. S. District Courts are limited in using 42 § 1983 to test the Constitutionality of State Statutes presumptively valid. This case exceeds that limitation and violates State Statute.

A New Mexico Legislative Act presumptively valid was declared unconstitutional thru 42 § 1983 initially instituted in a United States District Court. Even though 28 U. S. C. § 1343 (3) authorizes § 1983 Federal District Court actions, this did not create an unconditional unlimited right to test State Statutes because of alleged violations of the First Amendment. *Valley Forge*, supra, and *Citizens v. Denver*, supra, were both First Amendment violations without requisite for "standing". Those two cases clearly placed a limitation on the use of § 1983. If it were not so traveling organizations promoting ideological aspirations have free rein to litigate alleged unconstitutional innovations at will. The "standing" rule requires an actual plaintiff with a "real or threatened injury". *Valley Forge*, supra. The Plaintiff or plaintiffs herein had no "standing" to sue, nor do they, he or it have any standing now to oppose the Prohibition of the Injunction and its elimination from the U. S. District court for the District of New Mexico. In *Citizens v. Denver*, supra, the 10th Circuit defined "standing" in these words "The question of standing—of whether "a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy (Sierra Club v. Morton, 405 U. S. 727, 731, 92 S. Ct. 1361, 1364, 31 L. ed. 2d 636 (1972) differs from all other elements of justiciability (see § 3-90 to 3-10, supra.) by focusing primarily "on the party seeking to get his complaint before a Federal Court" and only secondarily "on the issues he wishes to have adjudicated". *Flast v. Cohen*, 392 U. S. 83, 99, 88 S. Ct. 1942, 1952, 20 F. 2d 947 (1968). The Opinion continues to outline the Supreme Court of U. S. rules for the determination of "standing", which requires

two inquiries: "(a) whether the [party] alleges that the challenged action has caused him injury in fact, economic or otherwise".

U.S. SUPREME COURT DECISIONS ARE A FUNCTION OF SUPERVISORY CONTROL.

If we start with the assumption, then failure to follow the decision is to embark upon a totally non-jurisdictional voyage. The filing of a § 1983 Complaint which totally lacks any attempt to allege "injury in fact" is not simply the filing of a Complaint which fails to state a cause of action but is an attempt to deprive the State of its judicial functioning rights and to transfer them to a U. S. District Court in violation of a Supreme court of the United States rules. The Tenth Amend. is violated. Courts do not exist as forums whereby the relationship of States and the Federal government is sought to be changed. The injuction, that issued, exhibits a grave insult to State sovereignty resulting from a failure to recognize *Valley Forge,* supra, and a failure to realize that § 1983 and 28 § 1343 did not repeal the Tenth Amend. A failure to limit § 1983 as applied to State Legislative means a transfer of control over State Legislation from the State Legislature to U.S. District Court. That situation now prevails in New Mexico and urges immediate relief. Sec. 1983 and 28 § 1343 did not repeal Art. III either.

The Constitutional position of the U.S. Supreme Court demands acceptance by U.S. District Courts in a practical sense and a corresponding limitation upon the exercise of judicial authority therein. Directives laid down in *Valley Forge,* supra, are expressed in these

words, "A recent line of decisions, however, has resolved that ambiguity, at least to the following extent: at an irreducible minimum Art. III requires the party who invokes the court's authority" to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."

Almost every paragraph in *Valley Forge*, supra, is applicable herein and all the requisites are jurisdictional. The Court, p. 758, in *Valley Forge* combines the stated expressions of Art. III with its judicial pronouncements on "standing" to come forth with a disciplinary rule for Federal Courts and places its entire judicial point behind that not as a mere guide but as a compulsory rule requiring compliance under an Oath of office. In direct language "Valley Forge" denies standing based on the allegations of page 3 of the Complaint of "irreparable harm" and "loss of constitutional rights" in these words;

> "THE JUDICIAL POWER OF THE UNITED STATES DEFINED BY ART. III IS NOT AN UNCONDITIONAL AUTHORITY TO DETERMINE THE CONSTITUTIONALITY OF LEGISLATIVE OR EXECUTIVE ACTS."

injunction herein does not heed this ruling. It was not intended primarily as a means to educate the Bar; it is an exercise of inter-governmental authority. *Valley Forge*, supra, continues, "The exercise of the judicial power also affects relationships between the co-equal arms of the national government" to declare an Act of Congress unconstitutional is a "tool of last resort" and in speaking directly of the "standing" requisite, *Valley Forge*, supra, says the "Court has refrained from passing upon the con-

stitutionality of an act [of the representative branches] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whole interests entitled him to raise it". The Complaint and the Findings herein for either of the Duffys or the ACLU does not allege "standing" as required by Art. III and *Valley Forge*, supra .

THE OPINION WHICH IS THE COURT'S FINDINGS AND CONCLUSIONS CONTAINS THROUGHOUT UNPRECEDENTED, UNCONSTITUTIONAL METHODS OF INTERPRETATION OF A STATUTE.

Illustrations of the above are: On page 3, the Opinion denominates certain persons in and of official positions relative to what might be called sponsoring or lobbying efforts towards obtaining a Legislative Act. The motives of the persons were not recorded since the Opinion, p. 4, says "There is no formal written legislative history of H. B. 205". J. Burciaga had therefore conducted a hearing to fix responsibility for the Bill and found some individuals who he said wanted "prayer" in the schools. This method and judicial attitude appears throughout the Opinion and labels the Opinion as an innovative judicial device which would overcome the fact that *Gaines v. Anderson*, 421 F. Supp. 336 (D. C. Mass., 1976) had decided the "minute of silence" statute in Mass. and a three-man court held it to be constitutional. J. Burciaga names *"Gaines v. Anderson"*, p. 4, and says that H. B. 205 in New Mexico added the word "contemplation" "purportedly to demonstrate the neutrality of the statute". In other words, New Mexico H. B. 205 was on its face less offensive to the First Amendment even than *Gaines v. Anderson*, supra, which had so successfully passed the Constitutional test to have not been

appealed. However, the Opinion now embarks upon its new Constitutional interpretative method which goes behind the Statute *and since the thought categories involved herein is religious thought, religious belief and religious motivation, the Federal Court becomes a forum for the investigation of religious thought, belief and motivation as a means of determining constitutionality vel non.* Since it would have the power of subpoena or bench warrant to conduct this mind analysis seeking some religious belief and since it would be backed up by the "contempt power" it would be in fact a judicial method to determine individual religious beliefs and deciding State Statute's constitutionality in that way. Petitioners do not think U. S. District judges have the right to inquire into or judge peoples religious beliefs or allow any others to testify to citizens religious beliefs as a method of Constitutional interpretation.

The method used about religious motivation in the New Mexico legislature is applied also to the School Board of Las Cruces and he makes a factual determination about their decision implementing the Statute which asserts that "it is clear that they intended to implement a program of prayer in the schools in order to avoid the political wrath of their constituents". This is to charge them with improper and corrupt actions in office and denounces in wholesale fashion those in the community who wanted the Statute implemented. How and by what means "political wrath" is calculated and how and by what means this becomes a factor and how and by what principles it was brought to bear on the Board and how the Court could measure the various influences upon the minds of the Board so as to overcome their power of decision could only

be arrived at if at all by methods never before used in Courts as a method of deciding statutory constitutionality.

The Opinion clearly holds and actually decides unconstitutionality on the basis of religious motivation by sponsors or lobbyists or even legislators but how could this possibly invalidate a State Legislative action by both Houses and invalidate the signature of the Governor. Vocal prayer in school has been stricken but not because the supporters of the Bill were religiously motivated. The Opinion really brands legislative support for the Bill as something hostile to the government and the Opinion sounds in its law and words as opposition to religion because how can a person be devoid of all interior religious influences and how can the mythical non-religious persons be the only persons who can try to influence Legislative action. Chief Justice Burger in *Walz v. Tax Comm.*, 397 U.S. 664, 25 F. 2d 697, 702, 90 S. Ct. 1409, rejected this assertion "Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." The Chief Justice continues with these words so much in opposition to the thought of the Opinion, "No perfect or absolute separation is really possible; the very existence of the Religion clause is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement". The Opinion by J. Burciaga manifests an unwillingness to accept the reasonable interpretation of *Gaines v. Anderson*, supra. It is noteworthy that in the case of *Karen v. Treen*, 653 F. 2d 897 (1981), which the Opinion cites apparently believing it is supportive, the Louisiana statute attacked as a First Amendment violation had *two* sections, one of which was an au-

thorization for "one minute of silence" in public schools. The other component of the Statute allowed for actual "prayer" by students and teacher. This latter section of the Louisiana Statute was stricken *but* the Opinion says "The plaintiffs have no quarrel with the silent meditation provision of the Statute". The Opinion herein refuses to accept that either. If words are not to be judicially stripped of any objective basis for meaning, "sitting silently in a room with others" cannot be a violation of the "other" religious freedom unless that person is completely abnormal. The Constitution does not envision abnormalities as a guide for society.

THE OPINION EMBARKS UPON A SERIES OF WHOLLY UNPRECEDENTED PRINCIPLES OF CONSTITUTIONAL ANALYSIS WHICH WOULD DESTROY STATE OF NEW MEXICO SOVEREIGNTY.

In doing the above, J. Burciaga makes his U. S. District Judgeship the sole ruler in New Mexico and would make all departments and divisions of the State government subject to his power of nullification. The extremity of this unprecedented judicial action is illustrated by an Injunction against anything "similar" to New Mexico Statute 25-5-4.1, whatever something "similar" might mean to the particular U. S. District Court. The all-inclusive all-pervading nature of the control over New Mexico by the Opinion is not only totally unprecedented in American Judicial history but is also destructive of New Mexico sovereignty and violates the Tenth Amend. and would impose in Federal District Court control over New Mexico and continues to do so every minute the Injunction is in existence.

THE DEVELOPING YOUNGER DOCTRINE BARS JURISDICTION OVER CHALLENGES TO STATE STATUTE: FEDERAL JURISDICTION CAN OCCUR ONLY UNDER "EXTRAORDINARY CIRCUMSTANCES" ACCORDING TO YOUNGER.

To take jurisdiction in Federal Court of a presumptively valid State law for purposes of testing its constitutionality merely because the U. S. Supreme Court has no decision supporting it is to invade State sovereignty at every branch of the State government. There is no Federal right to do so even apart from standing and Art. III. These Petitioners assert that a basis in either reason or authority, *Gaines v. Anderson,* supra, is completely lacking so declaring the "silent minute" Statute which overwhelmingly passed the State Legislature and was signed into law. The assumption of Federal jurisdiction to pass on a State Legislative Act which is not directly in conflict with an existing Supreme Court of the United States decision should be dismissed. This is in addition to the Standing requirement of *Valley Forge,* supra, and the so-called Younger doctrine as developing, applies. This doctrine initiated in criminal cases has been extended to civil cases. *Middlesex County Ethics Comm. v. Garden State Bar Assoc.,* 102 S. Ct. 2515, and restricts somewhat § 1983 actions being brought in Federal Courts on the grounds that State judicial measures should be exhausted. As developed, the restrictions placed by the so-called Younger doctrine upon Federal assumption of jurisdiction, requires a State Statute which expressly and clearly violates established Supreme Court of United States applicable decision. A variance from that violates the Tenth Amendment. New Mexico officials including the Judiciary take an oath to

support the Constitution of the United States. When the Legislature enacted 22-5-4.1, there is a presumption that they did so in conformity with the U. S. Constitution and in fulfillment of their oath.

Determination of unconstitutionality of a State Statute by a U. S. District Court automatically invaded state sovereignty from the instant of the decision of the U. S. District Court. This wrong was a continuous invasion of the sovereignty for every minute it is in force. Federal supremacy does not confer the right to take chances with State sovereignty.

The State of New Mexico and in particular the Judiciary have had no opportunity to pass on 22-5-4.1 and the U. S. District Court has expressly taken over the exclusive power to interpret New Mexico's own Constitution and call 22.5-4.1 unconstitutional based thereon Exhibit 1 p. 2.

As developed restrictions have been placed upon Federal assumption of jurisdiction in the so-called Younger Doctrine, 401 U. S. 37, 91 S. Ct. 746, L. Ed. 688 (1971). Those very narrow exceptions are:

1. bad faith and harassment
2. flagrantly and patently unconstitutional statutes
3. bias

Neither 1 or 3 above are claimed in the Complaint herein or the Opinion. Therefore 2 above is the only possible extraordinary circumstance exception to the Younger Doctrine. This New Mexico "One Minute of Silence" Statute is not even remotely unconstitutional, much less flagrantly and patently so. Therefore, this § 1983 action against a State Statute is not within any "exception" of a develop-

ing Younger Doctrine. The exception for a Statute "flagrantly and patently unconstitutional" as mentioned in "Younger" supra is narrowed in *Trainor v. Hernandez*, 431 U. S. 434, 95 S. Ct. 2281, 45 L. Ed. 2d 22 (1975), a case testing the constitutionality of the Illinois Attachment Act. In *Huffman v. Pursue, Limited*, 420 U. S. 592, 95 S. Ct. 1524, 44 L. Ed. 2d 15 the Supreme Court said: "The considerations of comity and federalism which underlie Younger permit no truncation of the exhaustion requirement. . . . Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do." Id at 610.

THE OPINION USES COMMUNITY DIVISIVENESS AS A MODE OF CONSTITUTIONAL INTERPRETATION, OP. pp. 9, 10.

Judge Burciaga says that § 22-5-4.1 has produced "divisiveness" in Las Cruces and affected general election there and that people were inclined to vote on the pros and cons of implementing the Statute rather than other bases. The trial judge allowed the trial to produce this type of evidence and he used it to decide constitutionality of 22-5-4.1. Page 10 of the Opinion says "It is clear that the moment of silence has caused a good deal of political divisiveness much of which is along sectarian lines in the community and has the potential to cause a good deal more". The Opinion's solution is to declare the Statute unconstitutional. The Court's concern for peace in the community plus his solution and Injunction not only as to 22-5-4.1 but also against anything "similar" means that the New Mexico State Legislature

had their acts invalidated because political controversy existed in Las Cruces. This is a judicial assumption of power and means that community disputes if found to be alarming or divisive are grounds for the elimination of the normal function of the State government. Since "contempt" power is present for enforcement and suspension of normal governmental functions it is a judicial form of "sanction" Law.

This "divisiveness" argument claimed the power to carry on a type of sampling of community sentiments and to declare a statewide legislative act unconstitutional because a local community is discussing it, adversary style. This is not a decree of unconstitutionality but a decree of nullification over a State Statute based on his own findings of peaceful controversy in the community. "Unprecedented".

THE COMPLAINT'S REQUEST TO THE U. S. DISTRICT COURT TO DECLARE 22-5-4.1 UNCONSTITUTIONAL BECAUSE IN VIOLATION OF THE *NEW MEXICO CONSTITUTION* WAS AN INVITATION TO THE U. S. DISTRICT COURT TO USURP NEW MEXICO JUDICIAL AUTHORITY.

The Complaint, Exb. 3, p. 4, para. 18, says "The observance of the period of silence is violative of the New Mexico Const., Art. II, § 11.

The Injunction, Exb. 1, p. 2, para. 4, says 22-5-4.1 and its implementation by the defendants violates Art. II, § 11 of the New Mexico Constitution.

The Conclusions of Law by the Court, Exb. 3, p. 28, says the same but adds a reason "in that it gives a pref-

erence by law to a particular mode of worship". How that conclusion follows is not explained but to interpret a New Mexico State Constitutional provision is beyond the legal authority of a United States judge in this action.

It is noteworthy as to how the ACLU labeled its Complaint as a Complaint for Declaratory and Injunctive Relief. To file a Declaratory action in Federal Court to declare the unconstitutionality of a State Statute is violative of the Tenth Amend. The ACLU is not a New Mexico organization which could explain to some extent their Federal preference. In conclusion a Declaratory Relief Request is another indication of lack of "injury in fact".

THE OPINION VIOLATES THE TREATY OF GUADALUPE HIDALGO.

New Mexico has additional protection for religion by the Treaty of Guadalupe Hidalgo, Art. II, Sec. 5 of New Mexico Const., which reads "The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate". This may seem strange to an organization foreign to New Mexico like the ACLU but it is a living constitutional protection for religion in New Mexico for the benefit of those who want to think, be or act in a religious way. The Opinion violates that right. The United States of America was a party to the Treaty of Guadalupe Hidalgo and is charged with its enforcement down to this very day. New Mexico may be unique but it is a treaty protected area and its citizens are treaty protected persons. The United States promised Mexico and the inhabitants of this area

that they would have special religious protection. There would have been legal "consideration" in exchange for the sovereign's promise, e. g. cooperation with the United States in working out a stable government and society in exchange for this religious freedom which they had always possessed and which was an established custom for centuries. We visualize no state where this Opinion would be valid but New Mexico would be the last. We have changed since New Mexico's Constitution of 1912 and there may be more citizens who do not value "religious" "rights", "principles" and "immunities" but Constitutional protections remain and with that same meaning as when adopted. J. Burciaga would discard Art. II, Sec. 5 because his analysis shows percentage figures towards this "minute of silence" which favor opponents.

Federal supremacy does not include the right to disregard a Treaty. Although no basis for unconstitutionality is conceivable under the establishment clause of the First Amendment even if it did the religious freedom guaranteed by the Treaty of Guadalupe Hidalgo would protect New Mexico school children from the Opinion.

The Bill of Rights as declared by Brigadier General Stephen W. Kearny, September 22, 1846, contains an interesting and applicable paragraph Third. "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no person can ever be hurt, molested or restrained in his religious profession if he does not disturb others in their religious worship; and that all Christian churches shall be protected and none oppressed, and that no person on account of his religious opinions shall

be rendered ineligible to any office of honor, trust or profit". When the 1983 Opinion is placed alongside General Kearny's Bill of Rights a great variance appears which exhibits contradicting motives. The Kearny Code expresses careful respect for and protection of "religion" and religious people. The Opinion exhibits great hostility to "religion" and a desire to suppress it. The Kearny Code exhibits a trust in the people of New Mexico and a respect for them and their institutions. The Opinion exhibits hostility to the present inhabitants and discriminates against them if they show religious motivation.

Para. Third of the Code also contains a complete repudiation of the Opinion on the "Silent Minute" of prayer, etc. when it states that no person can be "restrained in his religious profession if he does not disturb others in their religious worship". General Kearny was a United States government official. He represented his government's thinking as of that time. The New Mexico Constitution replaced the Code but its provisions on religion and other matters would have incorporated the Code unless expressly contradictory.

To interpret "silence" as an invasion of others' religious rights is a denial of state of New Mexico constitutional rights.

Turning to the Treaty of Guadalupe Hidalgo, Art. IX, we find an interpretation in *Chadwick v. Campbell*, 115 F. 2d 401 (10th CCA, 1940) and it is stated in Vol. I, N. M. S. 1978, historical documents, pamphlet 3, p. 79. Purpose of Art. IX was to protect Mexicans covered herein against discrimination in respect to property or religion.

The last phrases of Art. IX of the Treaty, p. 79, supra, says "and secured in the free exercise of their religion without restriction". It could not be true that the people here lost the protection of the Treaty by becoming a state. Again the Treaty respects and protects religion and its practice. The Opinion examines legislative intentions and motives and when finding them in a few instances denounced the whole legislative act. From being a vehicle against "discrimination" this § 1983 action is one propounding a discrimination and ends up successfully accomplishing it and enjoining any change forever.

The true Enabling Act of June 20, 1910, Historical Pamphlet 3, supra, at page 106, states "That perfect toleration of religious sentiment shall be secured". J. Burciaga's Opinion prohibits any attempt at legislation or implementation which has a religious sentiment, applicable to the public school system.

The ACLU may represent an organized effort against religion and this may be popular, but is violative of New Mexico's Constitutionally protected rights.

THE OPINION VIOLATES FREEDOM OF RELIGION

It falsely concludes that the concept of "separation" makes "religion" a hostile element opposed to "good government". J. Burciaga did therefore view religion wherever it appears as an enemy of the State. He assumes the obligation to suppress anything that smacks of religion as it appears in any governmental function including the public schools. This role is awesome in its threat to individual liberty. When the government con-

siders religion as its enemy then it will proceed to suppress this imaginary foe. Specifically and pointedly the "religious factor" in this case appears in the mere presence of "children". They are the focal point. J. Burciaga would bar "religion" as it "might" be present in their thinking. He does not wait until there would be an expression of religious thought. Mere silent presence with the possibility that they might have some religious thought is sufficient to energize the governmental force. These children in the Las Cruces school are potentially carriers of religious thought, desires or intuition. This possibility makes them "dangerous" to the First Amendment. These children perform no governmental function but merely sitting in silence in a tax supported school makes them "defilers" of the "separation" concept. It is not an idle conclusion that the court finds that a child's potential to have a religious thought creates an invasion of his school chums.

All New Mexicans carry in their persons and bring it to school with them certain constitutional protections both State and Federal. The opinion is blind to those rights. The Opinion fails to mention them. Throughout J. Burciaga takes on the whole government of the State of New Mexico and its Constitution and laws. He furthers the concept of the ACLU to the destruction of all other rights. Under no American law is an individual's mere thought or interior aspiration per se an infringement of another persons liberty. This Opinion decides differently. There is no assurance that hostile thought shall be limited to "religion". Thoughts about a partisan political party in non-conformity with the judges political preference could serve as a basis for another

conclusion if a Federal judge finds it "divisive or discriminatory". We would be entering a new era of law and government if "silent thought" is violative of another persons rights. "Childrens" minds are the issue because that is where the actual deprivation takes place. This is not primarily a governmental power struggle between a local Federal Court and the State Legislature although it is that also. After all the proper representatives should have something to say about our children. J. Burciaga is telling children from his courtroom with all its indication of authority that it is contrary to law to have religious silent thoughts in school houses in Las Cruces. He is telling them that the government in his Court prefers the "child" who has no religious thoughts. This is the favored person who needs protection from those who sit alongside with a possible thought of "religion" in its broadest sense. However, each child carries constitutional rights everywhere which in New Mexico were guaranteed by Constitutional provisions which conflict with J. Burciaga's concept of religious elimination.

Art. II, Sec. 11 of the New Mexico Constitution is entitled Freedom of Religion and one part reads "no person shall be molested or denied any civil or political right on account of his religious opinion". The Opinion directly infringes upon this right when he denies the right of citizens to lobby for House Bill 205 because of their belief in religion and penalizes the whole state because of this expression which he finds religiously motivated. According to Art. II, Sec. 11 religious opinions or "mode of worship" cannot be the basis of the denial of "any civil or political right".

Children have and need their Constitutional protection which is why we base this Petition on representation of their interests. Children in Las Cruces had the right to "religious thought" for one minute. This is religious freedom. This was a "political" right or "privilege". J. Burciaga denies them this right merely because they might have a religious thought. If religious thought can be a mode of worship they are "molested" or "denied" the Constitutional right for the very reason the right exists. Perhaps the crowning blow to Constitutional protection for freedom of worship occurs when the Opinion speaks of the "impressionable" child's mind. The Opinion would guard this child's mind from any "impression of religion". Even if when it came exclusively from the child's own mind, so the Opinion removes the opportunity for this child's cogitation.

Art. II, Sec. 11 and the First Amendment are obviously intended to protect religion as it exists in each individual, not to destroy it. Religion is a Constitutionally protected right. Art. II, Sec. 4 of the New Mexico Constitution says all persons are born equally free and have certain natural inherent and inalienable rights etc. Children are not equal when those with a religious thought or conviction are persecuted at the instance of an organization claiming adherence to a no-religious thought child in the same classroom.

CONCLUSION

By the principles laid down in Valley Forge supra this Petition for Prohibition lies. The Plaintiffs below were barred from the Federal Courts of New Mexico by their language "In this manner does Art. III limit the

federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers which are traditionally thought to be capable of resolution through the judicial process." Valley Forge p. 758.

Extraordinary writs exist for the enforcement of failures to follow Art. III. The method of enforcement is not an appeal. Federal judicial power has been overextended by the District Court below. Points of law and errors thereon are not the issues. If violation of Art. III take the same course as anything else a non-justiciable case receives the same treatment as a justiciable one. State ex rel "One Minute of Silence" asks reinstatement and protection for all New Mexico persons. The ACLU has no "standing" now and never had it.

The Court below exceeded its jurisdiction as defined in Art. III. The State of New Mexico, as all states, is not constitutionally equipped to contest with U. S. District Judges in order to preserve its rights under the Tenth Amend. nor are its citizens. The heirarchy of Federal Judicial authorities establishes the appropriate forum and procedure for the imposition of Art. III limitations upon its own inferior courts.

All of New Mexico seeks the protective power of this Court.

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Attorneys for Petitioner
State of New Mexico ex rel
"One Minute of Silence"
and all Petitioners

Petitioners below are residents and citizens of New Mexico, eligible voters therein, taxpayers, signing for themselves as such and their children where appropriate. Said Petitioners have a superior right to be such, in opposition to and with a superior claim to the American Civil Liberties Union who asserted that right in the proceedings in the U.S. District Court, and pray for the relief from the Injunction entered below and reinstatement of New Mexico Statute "One Minute of Silence".

John J. Finnegan, resident of Dona Ana County
Roland A. Voriden Haas, Dona Ana Co. Resident
Frances Long Repp, Dona Ana Co. Resident
Randall C. Martin, Las Cruces
James B. Ells, Las Cruces
Ward W. Repp, Dona Ana County Resident
Thomas H. Cline, 2 children, Las Cruces school dist.
Clayton T. Walsh, Las Cruces
Jean Walsh, Las Cruces
Jeanne S. Clayshulte, Dona Ana Co. Resident
Henri L. Bourgeois, Las Cruces
5 children in local schools
Edward M. Greene, Las Cruces
Terrel E. Haines, 3 children in local school, Las Cruces
Alene L. Haines (Mrs. Terrel Haines), 3 children in L. C. Public Schools

Joe D. Walsh, Las Cruces, N. Mex.
John Gwin, Las Cruces
Margaret Erdman, Las Cruces
Winn Erdman, Las Cruces

Petitioners below are residents and citizens of New Mexico, eligible voters therein, taxpayers, signing for themselves as such and their children where appropriate. Said Petitioners have a superior right to be such, in opposition to and with a superior claim to the American Civil Liberties Union who asserted that right in the proceedings in the U.S. District Court, and pray for the relief from the Injunction entered below and reinstatement of New Mexico Statute "One Minute of Silence".

Lucia Sena, Former teacher in Bernalillo Co.
Ellen Sena, " " " " "
Maria Romero, gov't worker " " "
Nester E. Sanchez, Retired, Bernalillo Co.
Anna Mae Wich, homemaker, " "
Cornelia Bieza, Secretary, Sandoval County
Agnes Bray, Cook, Rectory, Bernalillo Co.
Cora Bullegos, Bernalillo Co.
Lena D. Trujillo, Bernalillo Co.
Marjorie Ehusaec, Bernalillo Co.
Patricia Fahrbach, Bernalillo Co.
Eleanor Perkins, Bernalillo Co.
Margaret Myers, Bernalillo Co.
Madeline Knox, Bernalillo Co.
Isabel Guillen

Petitioners below are residents and citizens of New Mexico, eligible voters therein, taxpayers, signing for themselves as such and their children where appropriate. Said Petitioners have a superior right to be such, in opposition to and with a superior claim to the American Civil Liberties Union who asserted that right in the proceedings in the U.S. District Court, and pray for the relief from the

Injunction entered below and reinstatement of New Mexico Statute "One Minute of Silence".

John Sam Johnson, Bernalillo County
Virginia L. Garcia, Alb. Public Schools
Eva Richardson, Bernalillo County
Nan O'Connor, Bernalillo County
Frances G. Vigil
Margaret C. De Baca, Bernalillo Cty.
Mary Lynn Akey, Bernalillo County
Marianne C. Salceies, Bernalillo County
Joseph A. Brega, Sandoval "
Patricia Cline, HPS Employee MacArthur Elem.
Catherine Leyba, Bernalillo County
Ernest E. Leyba, Bernalillo County
Rev. Thomas J. Hogan, S. J.

Petitioners below are residents and citizens of New Mexico, eligible voters therein, taxpayers, signing for themselves as such and their children where appropriate. Said Petitioners have a superior right to be such, in opposition to and with a superior claim to the American Civil Liberties Union who asserted that right in the proceedings in the U.S. District Court, and pray for the relief from the Injunction entered below and reinstatement of New Mexico Statute "One Minute of Silence".

Edward C. Domme, Bernalillo County, N. M.
James H. Kelly, Bernalillo County, N. M.
John M. Wiesen, Bernalillo County, N. M.
Francis J. Morrato, Bernalillo County, N. M.
Kathryn M. Domme, (Mrs. Edward C. Domme), Bernalillo County, N. M.
Mary Lee Morrato (Mrs. Francis J. Morrato), Bernalillo County, New Mexico
Alice S. Kelly (Mrs. James H. Kelly), Bernalillo Co., New Mexico
Helen Wiesen (Mrs. John M. Wiesen) Bernalillo Co., New Mexico
Robert Herman, Bernalillo Co., New Mexico

No. 83-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW MEXICO, ex rel.
"One Minute of Silence" Statute, et al.,

Petitioners,

—vs.—

JUAN G. BURCIAGA, U.S. District Court Judge
for the District of New Mexico,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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New York, New York 10036
(212) 944-9800

Attorney for Plaintiffs Below
Jerry and John Duffy

October, 1983

QUESTION PRESENTED FOR REVIEW

Should this Court grant a writ of certiorari to review the Tenth Circuit's denial of a petition for writ of prohibition seeking to enjoin the enforcement of a district court judgment, where petitioners were not parties in the district court, nor privy to the proceedings, and neither participated nor were represented in the district court in any way?

LIST OF PARTIES TO THE PROCEEDINGS

The present petition for a writ of certiorari is being misrepresented to the Court as a petition ex rel. the State of New Mexico. Neither the present petition nor the petition for a writ of prohibition in the Tenth Circuit was instituted by the Attorney

General of the State of New Mexico in the name of, or on behalf of, the State of New Mexico. The State of New Mexico and its Attorney General were not parties in and did not participate in any way in either the district court or the Court of Appeals. They have had nothing to do with the present, unauthorized petition. Therefore, they are not parties here under this Court's rules.

Similarly, although the Las Cruces Public Schools, its Superintendent, and the members of its Board of Education were parties defendant in the district court, they took no appeal to the Tenth Circuit, and were not parties in or represented in any way in the proceedings in the Tenth Circuit in which the real petitioners here, purporting without authority to act "ex rel." the State of New Mexico, sought a writ of prohibition. Accordingly, under this Court's Rule 17 they are not parties here either.

Petitioners correctly identify only the sole named respondent, the Honorable Juan G. Burciaga, United States District Judge for the District of New Mexico, whose final judgment in Duffy v. Las Cruces Public Schools, 557 F.Supp. 1013 (D.N.M. 1983) they seek to enjoin even though they were neither parties nor privy to the record and did not participate in any way in the proceedings in the district court.

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JURISDICTION

This Court lacks jurisdiction pursuant to 28 U.S.C. §1254(1), since the petitioners were not "parties" in any civil or criminal case in the Court of Appeals sought to be reviewed. Oregon State Elks Assn. v. Falkenstein, 409 U.S. 1099 (1973); Ex parte Leaf Tobacco Board, 222 U.S. 578, 581 (1911); Ex parte Cutting, 94 U.S. 14, 20-22 (1877). Jurisdiction does not lie under 28 U.S.C. §1651, since the writ sought is neither "necessary" nor "appropriate" under these circumstances, and is not in aid of this Court's appellate jurisdiction.

STATEMENT OF THE CASE

The New Mexico Legislature, during its 1981 session, enacted Section 25-5-4.1(NMSA 1978), which authorizes each local school board to institute a period of silence at the beginning of the school day to be used for contemplation, meditation, or prayer. On October 19, 1981, Jerry Duffy, on his own behalf and as next friend of John P. Duffy, his minor son, filed a complaint for declaratory and injunctive relief in the United States District Court for the District of New Mexico to declare the statute unconstitutional and to enjoin its implementation in the Las Cruces Public Schools. Named as defendants were the Las Cruces Public Schools; John E. Stablein, Superintendent; and Joan Pucelik, Walter Rubens, Vincent Boudreau, Ms. Tom Salopek, and Everett Crawford, in their official capacities as members of the Las Cruces Board of Education.

The case was tried before the Honorable Juan G. Burciaga, United States District Judge. All of the issues were thoroughly and exhaustively briefed by both sides pursuant to a motion to dismiss, a motion for summary judgment, and in post-trial memoranda. On February 10, 1983, the court entered an order granting the injunctive and declaratory relief requested by the plaintiffs. (See Petition App. 1 and App. 25).

During a public meeting held in Las Cruces, the defendant Board of Education voted unanimously not to appeal the district court judgment. The defendants, in fact, expressed relief that the statute and its attendant litigation, which had caused tremendous controversy and political devisiveness within the community, had finally been laid to rest.

One Jean Walsh, a petitioner here, who was not a party to the proceedings below,

nevertheless sought to prosecute a direct appeal to the Tenth Circuit. Although Walsh purported to be acting in her own behalf and "in behalf of children within the Las Cruces School District", Walsh did not allege that she had children of her own within the school district. Walsh asserted standing to appeal as a taxpayer, alleging previous payment of attorneys fees and costs by the Risk Management Division of the State of New Mexico. (It should be noted, however, that no tax monies were spent in defense of the action, nor in the award of attorneys fees to the prevailing party, inasmuch as the defendants maintained a policy of insurance with the Risk Management Division from which such fees and expenses were paid.) On June 29, 1983, the Tenth Circuit dismissed Walsh's appeal for lack of standing.

Unsatisfied with the decision of the district court and correctly anticipating the

denial of her frivolous appeal, Walsh and others filed a petition for a writ of prohibition in the Tenth Circuit on March 30, 1983 (App. 42-79). On April 8, 1983 before The Honorable Robert H. McWilliams, The Honorable James E. Barrett, and The Honorable William E. Doyle, Circuit Judges, the Tenth Circuit denied Walsh's petition (App. 29). The pending petition for a writ of certiorari pertains only to the Tenth Circuit's denial of that petition for a writ of prohibition.

SUMMARY OF ARGUMENT

The Tenth Circuit determined that Jean Walsh, a petitioner herein, lacked standing to appeal the judgment entered in Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983). Nevertheless, Walsh and others similarly situated then filed a petition for writ of prohibition in the Tenth Circuit to enjoin enforcement of the judg-

ment. Those petitioners, by and through their attorney, Eugene E. Klecan, have intentionally deceived the Tenth Circuit and now this Court by captioning their petition, "STATE OF NEW MEXICO,ex rel.," when, in fact, there was no appeal taken from the district court's judgment and the State of New Mexico has not participated in these proceedings in any way.

The Tenth Circuit's denial of the requested writ of prohibition does not, under these circumstances, warrant this Court's review.

ARGUMENT

Petitioners have not demonstrated any basis for this Court's jurisdiction to grant this petition. See supra, at 1.

Petitioners insist that the Tenth Amendment to the United States Constitution

guarantees them "The right to defend the sovereignty." (Pet.App. 45). They assert that any act of any state legislature is an act of self-government and therefore a right guaranteed to the people by the Tenth Amendment, not subject to review by the federal judiciary. Such a conclusion leads to the absurd result that the Tenth Amendment takes precedence over all other provisions of the United States Constitution, even where state action has been judicially determined to be unconstitutional. This is not the law. Cooper v. Aaron, 358 U.S. 1 (1958).

Petitioners argue that unless the district court's judgment is enjoined, they will suffer a denial of their right to petition the government for a redress of grievances. But they are free to petition whomever they choose, notwithstanding any actions allegedly taken by the courts below. Moreover, petitioners have not been

legally aggrieved by the judgment. The injunction was entered against only the defendants in the underlying law suit. No injunction was entered against Walsh and the other petitioners herein.

To hold that the Tenth Amendment guarantees "to the people" the right to govern themselves in a constitutionally impermissible manner is legally untenable, and would deny Jerry and John Duffy their First Amendment rights which they successfully protected in a case from which defendants did not appeal.

Petitioners and their attorney have gone to great lengths to create lengthy and expensive litigation, and to mislead this and other courts in their attempts to introduce religious activity into the public schools in violation of the First Amendment. This frivolous petition should be promptly denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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